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MAY 13 2002

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
ENVIRONMENTAL HEARINGS OFFICE  
STATE OF WASHINGTON

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AIRPORT COMMUNITIES COALITION,	)	
	)	
Appellant,	)	
	)	
CITIZENS AGAINST SeaTac	)	
EXPANSION,	)	
	)	PCHB No. 01-160
Intervenor/Appellant,	)	
	)	
vs.	)	
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF ECOLOGY, and	)	
PORT OF SEATTLE,	)	
	)	
Respondents.	)	

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TRANSCRIPT OF PROCEEDINGS

DAY TWO

March 19, 2002  
Lacey, Washington

ORIGINAL

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BE IT REMEMBERED that the above-entitled matter came on for hearing before the Pollution Control Hearings Board, Day Two commencing on the 19th day of March, 2002, and continuing through Day Ten, the 29th day of March, 2002. The hearing was conducted at the Environmental Hearings Office, 4224 6th Avenue SE, Rowe Six, Building 2, Lacey, Washington.

Sitting as the Washington State Pollution Control Hearings Board were KALEEN COTTINGHAM, presiding; ROBERT JENSEN, Board Chair, and BILL LYNCH, Member.

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A P P E A R A N C E S

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I N D E X

PAGE REFERENCE

MOTION TO PUBLISH DEPOSITIONS 2-0001 - 2-0024

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By Mr. Reavis 2-0045 - 2-0048  
By Mr. Stock 2-0048 - 2-0051  
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THOMAS LUSTER

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I N D E X

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E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>IDENTIFIED</u>	<u>ADMITTED</u>
0200	Resume' of Thomas R. Luster	2-0056	
0201	2-11-97 Memo to file from Tom Fitzsimmons re Delegation of Authority	2-0059	
0202	11-25-98 Memo from Paul Ehlers to Al Jacobs	2-0061	
0216	10-18-00 Email from Tom Luster to Ray Hellwig	2-0063	
0005	Chapter 173-201A WAC	2-0067	
0221	11-7-00 Email from Ray Hellwig to Kevin Fitzpatrick	2-0087	
0211	7-20-98 Letter to Port from Ecology	2-0097	
1011	Parametrix Summary of Wetland Mitigation	2-0137	
2014	Natural Resource Mitigation Plan November 2001	2-0138	
2025	How Ecology Regulates Wetands, April 1998	2-0162	
2131	Map	2-0178	
0801	Map	2-01	2-0186
0802	Map	2-0185	2-0186
0600	4-6-98 Memo to Jim Kelley from Paul Tappel	2-0212	
2132	Public Notice of Application	2-0220	

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1 March 19, 2002

2 MS. COTTINGHAM: We're on the record. We're  
3 here on two motions. One is a motion to publish certain  
4 depositions, and the other is a motion in limine to  
5 exclude late-produced documents. Which one would you  
6 like to do first?

7 MR. KRAY: It's your choice.

8 MS. COTTINGHAM: How about if we do the motion  
9 to publish.

10 MR. STOCK: That's ACC's motion to publish. I  
11 will speak up on behalf of ACC with respect to that.

12 Preliminarily, Miss Cottingham, we did check the  
13 cover memo that was sent in and there was a typo. It  
14 refers to CR 36(b)(6), and there isn't such a rule, and  
15 it should be CR 30(b)(6).

16 MS. COTTINGHAM: That's what I thought, but I  
17 just wanted to check.

18 MR. STOCK: We are invoking CR 32(a) and  
19 asking the board to publish certain depositions of  
20 Department of Ecology witnesses. CR 32(a), and I'm going  
21 to read it because I think it is unequivocal in allowing  
22 us to move to publish the depositions and for those  
23 depositions to then be used for any purpose including  
24 submission into the record as testimony.

25 CR 32(a) provides, "The deposition of a party or of

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1 anyone who at the time of taking the deposition was an  
2 officer, director or managing agent, or a person  
3 designated under rule 30(b)(6) or 31(a) to testify on  
4 behalf of a public or private corporation, partnership or  
5 association or governmental agency, which is a party, may  
6 be used by an adverse party for any purpose."

7 We are relying upon two different segments of that  
8 rule to ask the board to admit the testimony, the  
9 deposition testimony of Department of Ecology witnesses.

10 First of all, we are asking the board to take the  
11 deposition testimony of Mr. Fitzsimmons, Mr. White, and  
12 Mr. Hellwig pursuant to the first portion of 32(a)(2) and  
13 that is the deposition of an officer, director or  
14 managing agent.

15 In Ecology's response, Ecology acknowledges that  
16 those three individuals fit within the rule. There's no  
17 question about Mr. Fitzsimmons as the director of the  
18 Department of Ecology, and Ecology concedes with respect  
19 to Mr. Hellwig and Mr. White that there's a colorable  
20 argument that they should fall within that rule, too. So  
21 I think, without doubt, under that segment of 32(a),  
22 those three depositions come into the record.

23 The next segment of that rule that we're relying  
24 upon is the segment that says that individuals designated  
25 by a party pursuant to rule 30(b)(6) shall also be

**AR 055074**



1 admitted and can be used by an adverse party for any  
2 purpose. And with respect to the depositions of Ann  
3 Kenny, Eric Stockdale, John Drabek, Kevin Fitzpatrick,  
4 and Peter Kmet, K-M-E-T, we are asking the board to allow  
5 those depositions to come into the record and to be  
6 submitted as testimony.

7 Attached to Mr. Witek's declaration in support of  
8 the motion is a series of communications between Ecology  
9 lawyers and us concerning Ecology designating individuals  
10 as 30(b)(6) deponents. It started out in December, we  
11 properly served a notice of 30(b)(6) depositions, asking  
12 the Department of Ecology to designate individuals to  
13 speak and testify at deposition with respect to each of  
14 the 21 or 22 stipulated issues. Ecology responded, saying  
15 those were legal issues and we don't have any obligation  
16 under 30(b)(6) to designate.

17 There was a series of correspondence down the road  
18 where we wrote to Ecology and said, look, what we want is  
19 individuals designated to testify about the facts and  
20 Ecology policy behind each of the 22 stipulated issues,  
21 but if you need help in understanding what those issues  
22 are, we designated the five general areas, factual areas,  
23 that we wanted 30(b)(6) deponents designated by Ecology.

24 JUDGE LUCAS: Did you say five general areas?

25 MR. STOCK: Yes. And those five general areas

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1 are set forth in Exhibit D to Mr. Witek's declaration,  
2 was our February 12 letter. And those five general areas  
3 really cover the issues that we're talking about here  
4 over the next two weeks; wetlands and wetland mitigation,  
5 storm water and stormwater mitigation, stream flow  
6 analyses and mitigation, fill criteria, and the  
7 department's policy on beneficial use of storm water.

8 Ecology's obligation under 30(b)(6) is not  
9 permissive, it is mandatory. The rule says that the  
10 parties shall designate. In response to trying to work  
11 this out with Ecology, Ecology wrote a couple of letters  
12 saying, we've already designated our witnesses, we  
13 designated them in our preliminary witness list, and you  
14 have been taking depositions of Ecology witnesses and  
15 know who our witnesses are going to be. If that isn't a  
16 designation in form, then I don't know what is. I think  
17 Ecology has designated now under 30(b)(6) all of the  
18 individuals that are on its witness list and,  
19 particularly, those individuals whose depositions we  
20 took.

21 And under CR 32(a)(2), 30(b)(6) depositions can be  
22 used by an adverse party for any purpose. It's Hornbook  
23 law of what we are doing here. Orland and Teglund state  
24 that the deposition of a party or of a specified  
25 representative of a party may be used at trial by the

**AR 055076**

1 adverse party for any purpose. And this is the key  
2 sentence. This use of adversary's deposition is  
3 permitted even though the party who gave the deposition  
4 has taken the stand. And so yesterday I was using the  
5 deposition of Ms. Kenny to take her back to her  
6 deposition and impeach the testimony that she was  
7 providing to the board live. That deposition, even  
8 though Ms. Kenny was here testifying, can now also be  
9 submitted into the record so that the board gets the full  
10 story.

11 What you are going to see, I think, over the next  
12 two weeks is you're going to hear one story here live  
13 from Ecology witnesses, and I think the board is entitled  
14 to hear the other story that is told in those  
15 depositions. We are not asking that all depositions be  
16 published. We went through and selected certain  
17 depositions. In terms of burden to the board, Ecology  
18 tries to make much of it being 1400 pages of deposition  
19 testimony. But if you look around this room, Ecology and  
20 the port, combined, have put in 38 notebooks of exhibits  
21 to ACC's 17, 10 of which actually are deposition exhibits  
22 that have been designated during the depositions by all  
23 parties.

24 Last night what I did was I pulled the deposition  
25 testimony that we want the board to put into the record

**AR 055077**

1 as testimony, and I've pulled it and can hand this up if  
2 you would like to see it, but what it is is it's a  
3 notebook containing the miniscripts of the depositions,  
4 and this is the total amount that we are wanting to put  
5 into the record and ask the board to read to get the  
6 story from Ecology witnesses, this one notebook. And I  
7 look around this room and I think about the tens of  
8 thousands of pages that Ecology and the port are asking  
9 this board to look at, and I think this is minimal in  
10 comparison to what is in this room now.

11 The rule is to be liberally construed. That's  
12 Wright and Miller and their citations in the Wright and  
13 Miller treatise to cases that hold that the rule is to be  
14 liberally construed.

15 I'm going to stop now and reserve the last five  
16 minutes of my time for any rebuttal.

17 MS. COTTINGHAM: And I assume you're speaking  
18 on behalf of all of you.

19 MR. STOCK: I will concede five minutes, a few  
20 minutes to Mr. Poulin if Mr. Poulin has anything to say  
21 with respect to CASE.

22 MR. POULIN: I don't have much at all to add.  
23 I believe just as a matter of practicality we have to nod  
24 to the limited time available in this forum, and it's  
25 simply not possible for us to recreate the substance of

**AR 055078**

1 the very important information that we deduced and pulled  
2 out of the witnesses during the depositions. And it's  
3 important stuff. There was a great deal of effort and  
4 expense and time invested in the deposition process and  
5 that's all lost to the port. It's important, it should  
6 be part of the record and, as I believe you saw  
7 yesterday, it's not really feasible to restrict the use  
8 of a deposition to impeachment, particularly in this  
9 format with the time limitations that we have. There's  
10 another several dozen witnesses, and as Mr. Stock pointed  
11 out, we're not asking that every deposition taken be  
12 submitted to the record, just the important Ecology  
13 witnesses. I think that's reasonable and workable.  
14 Thank you.

15 MR. KRAY: Let me start there. It will be out  
16 of order. I have an argument prepared and I will make  
17 it. But let me start right there because I think that  
18 drives home one of the key points and why we feel so  
19 strongly that this should be denied. And that is ACC and  
20 CASE, as Mr. Poulin has just stated, are attempting to  
21 overcome the time limits placed on all the parties.  
22 Ecology and the port are going to put their evidence in  
23 during the course of this hearing within the time limits  
24 and they're going to focus for the board on the  
25 information that they think is critical, and that's

**AR 055079**

1 precisely one of the key problems we have with this  
2 approach is that it allows ACC and CASE to overcome those  
3 time limits by putting in an entire set of testimony or  
4 exhibits - and I will expand on those points - in a way  
5 that avoids the time constraints.

6 ACC's motion to publish the depositions of Tom  
7 Fitzsimmons, Gordon White, Ray Hellwig, Ann Kenny, Eric  
8 Stockdale, John Drabek, Kevin Fitzpatrick and Peter Kmet  
9 should be denied for four reasons.

10 First, the motion is fundamentally unfair to Ecology  
11 and the port.

12 Second, the motion places an unnecessary and  
13 unreasonable burden on the board.

14 Third, the motion is contrary to the court rules,  
15 the rules of evidence and the board's prehearing orders.

16 And, finally, ACC has waived any claim to publish  
17 the depositions.

18 In essence, ACC belatedly asked the board to permit  
19 it to add over 1400 additional pages of evidence into the  
20 record with no explanation for its delay or, more  
21 importantly, which portions of the transcript ACC  
22 actually relies on in support of its case.

23 ACC had ample time to raise this issue earlier.  
24 Instead, ACC filed its motion on the next to last working  
25 day before this hearing began. Whether the board

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1 characterized the deposition as testimony or exhibits,  
2 ACC was obligated by the board's prehearing orders to  
3 identify this information to Ecology, the port and the  
4 board long before last Thursday.

5 If the board characterizes the depositions as  
6 testimony, then ACC was obligated to identify the  
7 individuals on its final witness list by February 8,  
8 2002, and either provide prefiled direct testimony of no  
9 more than 30 pages per witness by February 15th or, over  
10 Ecology's objections, according to the board's third  
11 prehearing order, ACC could present Ecology employees as  
12 adverse witnesses even though prefiled testimony was not  
13 presented.

14 However, for ACC to present an Ecology employee as  
15 an adverse witness, that witness must have appeared on  
16 the final witness list. Ann Kenny, Gordon White, Eric  
17 Stockdale and Kevin Fitzpatrick are expected to testify  
18 in this matter. ACC has already called Miss Kenny as an  
19 adverse witness. No party identified Tom Fitzsimmons,  
20 Ray Hellwig, or John Drabek on a final witness list.

21 If the board characterizes the depositions as  
22 exhibits, ACC was obligated to identify the deposition  
23 transcripts on its final exhibit list earlier this month.  
24 ACC has never identified these deposition transcripts as  
25 exhibits.

**AR 055081**

1 Over the weekend of March 8 through 10, the parties  
2 worked vigorously to provide the board with a joint  
3 exhibit matrix indicating all proposed exhibits and  
4 objections to those exhibits. Last Tuesday, March 12th,  
5 the parties and Judge Lucas spent an entire afternoon  
6 working exhibit by exhibit through all 1400-plus exhibits  
7 to address evidentiary issues. Please recall that on its  
8 exhibit list, ACC expressly identified a number of  
9 deposition exhibits and then further identified all  
10 deposition exhibits in a single catch-all reference.  
11 Ecology and the port objected that by listing all  
12 deposition exhibits in a single catch-all reference, ACC  
13 had not properly carried its burden of paring down the  
14 deposition exhibits to those it truly relied upon.

15 After the evidentiary hearing, the board permitted  
16 ACC to present all 465 deposition exhibits. However,  
17 nowhere on the exhibit list or during any of the debate  
18 over the propriety of admitting the deposition exhibits  
19 did ACC raise the issue of presenting, let alone,  
20 admitting entire deposition transcripts as evidence.

21 ACC argues under court rule 32(a)(2) the deposition  
22 transcripts, quote, may be used by an adverse party for  
23 any purpose, end quote. However, ACC misstates the rule.  
24 CR 32(a)(1) broadly allows any party to use any  
25 deposition for impeachment. Ecology agrees, ACC may use

**AR 055082**



1 the depositions of testifying witnesses for impeachment  
2 purposes. CR 32(a)(2), the rule ACC relies upon, is more  
3 narrow. It only pertains to a party's managing agents.  
4 Tom Fitzsimmons falls under 32(a)(2). Gordon White and  
5 Ray Hellwig arguably fall under CR 32(a)(2). The other  
6 witnesses do not.

7 More important to this issue are the board's rule.  
8 And if we look at two particular rules, first off, WAC  
9 371-08-300 says in the second full sentence, "The  
10 interpretation of these rules of practice may be guided  
11 where relevant by the civil rules of Superior Court and  
12 the rules of evidence." Subpart 2 says, "Except where in  
13 conflict with the board's rules, Washington rules  
14 regarding pretrial procedures, civil rules and rules of  
15 evidence shall be followed."

16 Now, let's look at WAC 371-08-500 pertaining to  
17 rules of evidence and admissibility criteria. Under that  
18 WAC sub 1, "Evidence, including hearsay evidence, is  
19 admissible if in the judgment of the presiding officer it  
20 is the kind of evidence on which reasonably prudent  
21 persons are accustomed to rely in the conduct of their  
22 affairs." Skipping the second sentence, the third  
23 sentence says, "In passing upon the admissibility of  
24 evidence, the presiding officer shall give consideration  
25 to," and this is the part I want to emphasize, "but shall

**AR 055083**

1 not be bound to follow, the rules of evidence governing  
2 civil proceedings in matters not," and it goes on just to  
3 elaborate in a way that I don't think is important here.

4 The point of this rule is that the prehearing orders  
5 in this matter are the controlling authority more than  
6 the court rules. And now I want to turn to the  
7 prehearing orders.

8 I've already addressed the requirement they identify  
9 exhibits and that they identify parties in a timely  
10 fashion. The prehearing order, as I have argued it, I  
11 think is what we need to turn to say these should not be  
12 let in. But before I go all the way there, I want to  
13 also note that ACC's approach eviscerates Court Rule  
14 32(b) which states, "Objection may be made at trial or  
15 hearing to receiving in evidence any deposition or part  
16 thereof for any reason which would require the exclusion  
17 of the evidence if the witness were then present and  
18 testifying."

19 In its motion to publish, ACC does nothing to  
20 address when and how in the already-compressed  
21 circumstance of this hearing, ACC, Ecology, the port and  
22 the board are going to fairly address objections to  
23 specific parts of the deposition transcripts.

24 If the board grants ACC's motion, it will provide  
25 ACC with several unfair advantages. First, it will allow

**AR 055084**

1 ACC to present testimony without allowing Ecology or the  
2 port a fair opportunity to controvert the testimony.

3 Second, it will arguably give ACC an unfair  
4 advantage regarding prefiled direct because it will  
5 essentially allow ACC to present prefiled testimony  
6 beyond the 30-page limit and testimony which Ecology and  
7 the port were not given an opportunity to controvert in  
8 their own prefiled direct testimony.

9 Third, it will allow ACC an unfair advantage  
10 regarding hearing time because it will allow ACC to  
11 present additional testimony not subject to the 22.5-hour  
12 limit.

13 With regard to the 30(b)(6) piece of ACC's argument.  
14 There are five areas that the parties generally agree are  
15 the broad subject matters of this issue; wetlands, storm  
16 water, stream flow, acceptable fill, and water right  
17 issues. Ecology designated its witnesses in each of  
18 those areas and those witnesses will testify. ACC now  
19 seeks to designate through 30(b)(6) the witnesses who ACC  
20 thinks Ecology should have testify, and that is not the  
21 purpose of CR 30(b)(6). The purpose is to ask the party  
22 whose witness it is to say who we think should testify on  
23 that issue. We've done so. Those are the people we are  
24 presenting to the board as part of this hearing.

25 Denying ACC's motion will result in no prejudice to

**AR 055085**

1 ACC. As yesterday's examination of Ann Kenny  
2 demonstrated, ACC is aware of using deposition  
3 transcripts in cross examination. Thus, for those  
4 testifying witnesses for whom ACC seeks to publish  
5 depositions, ACC will instead have the opportunity to use  
6 the deposition during examination and Ecology and the  
7 port will have a fair opportunity to object and the board  
8 will not be asked to unnecessarily read entire  
9 transcripts without knowing which portions of the  
10 transcript ACC seeks to rely on or which portions the  
11 port and Ecology object to.

12 Now, with regard to the one notebook concept, over  
13 the weekend I read a transcript in preparation for  
14 examination and one of those transcripts took me almost  
15 an entire day to plow through. So if we're putting in  
16 this number of transcripts, I don't want the board to be  
17 misled to think that it's no big deal to read through one  
18 of these notebooks full of deposition transcripts. These  
19 are dense, they refer to exhibits, they involve a lot of  
20 information that should be properly pared down by the  
21 parties and presented to the board in a much more  
22 confined package, and we have the vehicle available to do  
23 that.

24 The witnesses expected to testify are Ann Kenny,  
25 Gordon White, Eric Stockdale and Kevin Fitzpatrick. For

1 those non-testifying witnesses for whom ACC seeks to  
2 publish depositions, ACC has waived the opportunity to  
3 rely on that testimony because it has failed to timely  
4 identify the individuals as witnesses or, in the  
5 alternative, identify the deposition transcripts as  
6 exhibits. The sole possible exception to this argument  
7 is Peter Kmet. ACC originally identified Mr. Kmet as a  
8 possible witness. However, ACC has since dropped  
9 Mr. Kmet from its witness list. If ACC is permitted to  
10 present Mr. Kmet's testimony in any fashion, it should be  
11 live so that, one, ACC identifies the portions of  
12 Mr. Kmet's testimony on which it relies, two, Ecology and  
13 the port have opportunities to present objections and  
14 cross examine Mr. Kmet, and, three, the time taken for  
15 Mr. Kmet's testimony is properly assessed in the overall  
16 time allotted for hearing.

17 The board's ruling on Ecology's motion in limine  
18 regarding Tom Luster's expert testimony provides recent  
19 precedent for Ecology's argument that ACC waived its  
20 opportunity to publish these depositions. If Ecology  
21 waived its argument regarding Mr. Luster when it filed  
22 its motion shortly after ACC identified Mr. Luster as an  
23 expert witness, then surely ACC waived its argument here  
24 when it waited until two days before the hearing began,  
25 two working days before the hearing began, to raise this

1 issue and seek publication.

2 In conclusion, the board should deny ACC's motion to  
3 publish the depositions because the motion is, one,  
4 fundamentally unfair to Ecology and the port; two, places  
5 an undue burden on the board; three, is contrary to the  
6 rules of the court, rules of evidence and, most  
7 importantly, the board's prehearing orders; and, four,  
8 ACC has waived any claim to publish the deposition  
9 transcripts.

10 The board should only permit ACC to use those  
11 depositions for impeachment of testifying witnesses.

12 Thank you.

13 MS. COTTINGHAM: Are you going to --

14 MR. PEARCE: Thank you, Miss Cottingham, very  
15 briefly.

16 MR. STOCK: Miss Cottingham, the port did not  
17 submit any opposition to the motion so I'm not sure it's  
18 proper at this point for the port to be arguing against  
19 the motion.

20 MR. PEARCE: We certainly oppose the motion.

21 MR. STOCK: Well, there was no --

22 MS. COTTINGHAM: I'm going to allow it within  
23 the time. They've got a few minutes left.

24 MR. PEARCE: I have just one minute. We  
25 support Ecology's arguments. Just very briefly on the

1 30(b)(6) issue, insofar as this is an attempt to publish  
2 30(b)(6) depositions, no 30(b)(6) depositions ever  
3 occurred to publish. The ACC attempted to take 30(b)(6)  
4 depositions, Ecology objected to those depositions as  
5 being over broad and unduly burdensome. And if you talk  
6 about Hornbook law, Hornbook law is that if a party  
7 raises an appropriate objection, Rule 36 requires you to  
8 move to compel that discovery. They never did that.  
9 Instead, they waited until the very last second to raise  
10 this issue. So no 30(b)(6) depositions ever occurred, no  
11 preservation depositions ever occurred. And we urge you  
12 to deny this motion.

13 Thank you.

14 MS. COTTINGHAM: You reserved some time.

15 MR. STOCK: I did. I have a few points that I  
16 would like to make. I guess the first one is why is  
17 Ecology fighting so hard to keep this board from reading  
18 the words of its own witnesses? There is no unfairness  
19 here, there is no waiver, and we have asked the board to  
20 publish these depositions on a timely basis. I have been  
21 in trials where in the middle of trial we will move to  
22 publish the deposition and the judge, federal judge,  
23 recognizing that it is more efficient and expedient to  
24 accept the deposition rather than have someone sit in a  
25 witness chair and read it into the record, goes ahead and

1 takes it back to chambers and reads the deposition.

2 CR 32(a), the first three words say, "At the trial."  
3 It's not a question of timeliness. The motion to publish  
4 is timely, it can be done at the trial. And given that  
5 we did it two days before the start of the hearing is  
6 totally irrelevant.

7 Interestingly, Mr. Kray toward the end of his  
8 argument, and I wrote it down here, with respect to  
9 30(b)(6) designations, he says, we have done so. Ecology  
10 isn't disputing that the witnesses that have been deposed  
11 and have been on the parties' witness list, Ecology's  
12 witness list, are 30(b)(6) designees. That's who Ecology  
13 wants to speak on its behalf.

14 Mr. Kray tries to use the 22-and-a-half-  
15 hour-limitation against the parties to restrict what this  
16 board hears from ACC. That is not the purpose of the 22  
17 and a half hours. He is using it as a sword to restrict  
18 the evidence that this board should rightfully hear.

19 In terms of fairness, Ecology and the port can move  
20 to publish depositions. Throughout the whole course of  
21 this hearing, even up to the last day of this hearing,  
22 Ecology and the port under CR 32 have the right to  
23 designate a deposition. They certainly can designate the  
24 depositions of some of our witnesses if it comports with  
25 32(a)(2). They've chosen not to have done so. They may



1 do so later on. But it shouldn't be used as an attempt  
2 to restrict what this board hears.

3 In terms of the depositions not being on the matrix,  
4 I have never been in a case where a deposition itself is  
5 an exhibit that has to be a foundation laid and  
6 identified by the party. That just doesn't make sense to  
7 me. But the reality is that the depositions are  
8 designated on our final exhibit list. They start at  
9 Exhibit 176 on page 19 of ACC's February 20 exhibit list  
10 and we listed out the depositions.

11 I said when I saw that list, depositions aren't  
12 exhibits, but, in any event, we have designated them as  
13 exhibits.

14 We haven't waived anything. We are now asking this  
15 board to publish depositions and to read them at the  
16 board's leisure. It is not the same to read a deposition  
17 transcript for purposes of preparing cross examination.  
18 You know, I read Miss Kenny's deposition and it took me  
19 Saturday and Sunday to prepare for her examination. I'm  
20 not going to judge how quickly the board can read the  
21 depositions. Obviously, you can judge for yourself how  
22 quickly each of you can read the depositions. That is a  
23 much more efficient way for you to hear from the mouths  
24 of Ecology witnesses Ecology's story. So ACC  
25 respectfully asks that you follow the rule and allow the

1 depositions to be used by ACC as an adverse party for any  
2 purpose.

3 Thank you.

4 MS. COTTINGHAM: Okay.

5 MR. KRAY: I know I do not have a surrebuttal,  
6 however, I would --

7 MR. STOCK: If he is going to have a  
8 surrebuttal, I would request a few minutes.

9 MR. KRAY: Miss Cottingham, I apologize, but  
10 the one point I make I am happy to allow him to address,  
11 however, I believe Mr. Stock has mischaracterized  
12 Ecology's position on the 30(b)(6) and I take exception  
13 to that.

14 MS. COTTINGHAM: Okay.

15 MR. STOCK: You heard what he said.

16 MS. COTTINGHAM: Do you have any questions,  
17 Mr. Lucas?

18 JUDGE LUCAS: Well, the one thing that  
19 concerns me is it seems to me that the part of the rule  
20 that requires depositions to be admissible under the  
21 rules of evidence is being overlooked, and what about  
22 possible objections?

23 MR. STOCK: In the normal course what happens  
24 is if a party wants to, an adverse party wants to use a  
25 deposition, I've been in cases where I go through and in

1 a 100-page deposition, there's only ten pages that I want  
2 the court to read, so the court requires me to go through  
3 and highlight those portions of the deposition that I  
4 want the court to read. The other side then has the  
5 opportunity to go through and highlight those portions of  
6 the deposition that it wants the court to read, and also  
7 to make any objections to any questions in that portion  
8 of the deposition that I've highlighted.

9 The rule does provide that certain objections are  
10 reserved to trial. And I don't have any problem with  
11 that. If Ecology wants to go through and object to  
12 certain questions asked at the deposition that they  
13 didn't object to at the deposition, then there's a  
14 process for that, and that is typical where there are  
15 certain questions that may be objected to. So if there  
16 is an objectionable question, then it can be objected to  
17 and the board as it reads the deposition testimony, or a  
18 court, it deals with the objections as it reads it.

19 MS. COTTINGHAM: Mr. Kray.

20 MR. KRAY: Thank you, Miss Cottingham. Two  
21 points. First off, that is not what ACC has asked here.  
22 They have asked to put the entire deposition transcript  
23 in, and now, for convenience, Mr. Stock is changing their  
24 story to try to put in a more limited portion.

25 Second of all, the larger problem with this approach

1 in this particular hearing is that had ACC given the port  
2 and Ecology proper notice in this regard, we may have  
3 called those witnesses as witnesses during the course of  
4 the hearing and we may have factored the amount of time  
5 we needed for those witnesses into our overall strategy  
6 with regard to how are we going to fit our case into the  
7 time allotted for hearing. So now at this very late  
8 hour, we are put at the disadvantage of not being able to  
9 put those individuals on as witnesses to controvert the  
10 testimony that ACC has very selectively put in through  
11 the course of its depositions.

12 These depositions were not intended to tell both  
13 sides of the story. For the parties to get through them  
14 efficiently, the party who was taking the deposition told  
15 its side of the story by the questions it asked during  
16 the course of the deposition. It was our expectation  
17 that they would put that in through prefiled testimony,  
18 and then we would have an opportunity to tell the other  
19 side of the story. And that's the biggest problem here  
20 is what the board will get is one side of the story  
21 through witnesses that were not permitted to have the  
22 other side of the story told. And that is fundamentally  
23 unfair and it eviscerates the underlying time limits and  
24 the whole idea that you narrow down your case and pick  
25 the key points and present them during the course of the

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1 hearing within the same restrictions that the other  
2 parties are permitted to operate in.

3 MR. STOCK: Brief reply, please. I'm not  
4 changing my story. We want the board to read the entire  
5 deposition of each of those Ecology witnesses. We're not  
6 trying to select the good parts and put a burden on  
7 Ecology to select the parts of the depositions it thinks  
8 is good. As you saw yesterday, Miss Kenny was very adept  
9 at not answering the question and, instead, making a  
10 speech and putting in the record what she wanted to put  
11 in. And, as you read her deposition, there are good  
12 parts in there for Ecology.

13 So it's not a question of ACC changing its story  
14 now. ACC wants the board to read Ecology witnesses'  
15 words. It wants the board to see what Mr. Fitzsimmons  
16 has to say about these issues, and other Ecology managing  
17 agents, and, in particular, Mr. Fitzpatrick, who Miss  
18 Kenny substantially exclusively relied upon for the clean  
19 fill criteria and water quality issues. He is the  
20 manager of the water quality section for the Northwest  
21 Regional Office.

22 There's just no unfair advantage here to asking the  
23 board to read those depositions, given they have a right  
24 to also designate or also ask for publication.

25 MR. KRAY: Mr. Fitzpatrick will be here.

1 MS. COTTINGHAM: Thank you. I think we are  
2 going to move onto the next one. We've run over a little  
3 bit. What I am going to do on this motion is take it  
4 under advisement over the lunch break. Hopefully, we'll  
5 get a lunch break. I'll have some further discussions  
6 and, if possible, issue a ruling shortly after lunch.

7 Let's move on to the next one which is the motion to  
8 exclude late plans and reports.

9 MR. STOCK: Mr. Witek will be speaking on  
10 behalf of ACC.

11 MR. WITEK: My name is Mike Witek with Helsell  
12 Fetterman here on behalf of ACC, and I'm going to speak  
13 to appellant's motion in limine to exclude certain late-  
14 produced plans and reports.

15 There are 17 plans and reports that we identified in  
16 our motion and two that we actually attached to the  
17 motion that we think are probably the most germane.

18 One of those is the February 15, 2002 report of  
19 Mr. Riley, who is an employee of Papadopoulos Associates,  
20 and they have apparently prepared a model and a report  
21 based on this model that will address the fate and  
22 transport of contaminants within the embankment.

23 And the second example that we attached to our  
24 motion is a January 21 Parametrix wetlands technical  
25 memorandum submitted to the Corps of Engineers.

1           I wanted to be clear about the basis for our motion  
2 here because it's really two parts. First off, the  
3 respondents were asked in discovery to indicate the  
4 substance of the opinions of their experts and they were  
5 asked to produce everything that their experts would be  
6 relying on as the basis for their testimony. The  
7 documents that we identified in our motion could have and  
8 should have been identified and produced earlier pursuant  
9 to those discovery requests. But, more importantly, the  
10 board's October 30 prehearing order establishes a plans  
11 and reports identification date and an absolute  
12 production date of February 1.

13           The board's order states, "On or before November 15,  
14 2001, respondents Ecology and the port shall identify all  
15 plans and reports other than ministerial documents  
16 expected to be prepared pursuant to 401 certification and  
17 which either Ecology or the port intends to rely upon at  
18 the hearing. For those plans and reports that are  
19 completed as of November 15, 2001, respondents shall  
20 provide copies to ACC on or before November 15, 2001.  
21 For those plans and reports expected to be completed  
22 between November 16, 2001 and February 1, 2002,  
23 respondents shall identify estimated completion dates."

24           So that's the first half of the provision that we're  
25 really here talking about today. And that's the

1 provision that's quoted in the port brief at page 2 in  
2 the block quote on that page.

3 But if you read on, the board's prehearing order  
4 also says, "If those plans and reports are completed on  
5 or before February 1, 2002, respondents shall provide  
6 copies to appellant ACC when complete. Ecology and port  
7 are prohibited from relying at the hearing upon any plan  
8 or report prepared after November 15, 2001 unless such  
9 plan or report is noted on the above required list."

10 And then the prehearing order goes even further and  
11 states, "Even if noted on the list, Ecology and the port  
12 are prohibited from relying at the hearing upon any plan  
13 or report prepared after February 1, 2002."

14 It's also important to understand the reason for the  
15 plan and report cut-off date. And those are the reasons  
16 that were discussed on October 15, when we had the  
17 conference, the prehearing conference following argument  
18 on the stay.

19 And I think we can just look around at the binders  
20 that surround us and see that this is a large and complex  
21 case. Case management is particularly important in this  
22 type of case with the limited time to conduct discovery.  
23 And ACC expressed concerns in the October 15 hearing that  
24 we didn't want to see happen what happened in other  
25 significant 401 appeals such as Battle Mountain Gold,

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1           which we talked about on October 15th, where new plans  
2           and reports continue to come in even on the eve of  
3           hearing.

4           I think that the second point that I took from the  
5           prehearing conference was that in drafting the October 30  
6           prehearing order, it was really a compromise between the  
7           positions espoused by the parties on October 15th. ACC  
8           said, look, there's got to be reasonable assurance that  
9           the date that these certifications were issued, but, in  
10          any event, ACC pushed for a November 15 cut-off date that  
11          would be absolute, I think Mr. Stock described it as an  
12          iron curtain, while also reserving the right to argue  
13          that respective of the November 15th date, that  
14          reasonable assurance had to be there on the date that  
15          certification was issued.

16          Respondents argued that this is a de novo proceeding  
17          and we should be able to present any new evidence right  
18          up to the time of the hearing.

19          So a compromise was that the board wasn't going to  
20          make November 15 an absolute cut-off and that respondents  
21          could identify plans and reports by that date and could  
22          use them if produced before February 1, but February 1  
23          would be an absolute cut-off date.

24          And the purpose for this ties in with the overall  
25          discovery schedule. Appellants have to have a fair

1 opportunity to have their experts review any plans or  
2 reports in order to be able to meaningfully depose any  
3 port or Ecology personnel responsible for generating  
4 plans and reports. So the October 30 prehearing order  
5 was supposed to be able to allow this to happen in a very  
6 tight discovery schedule.

7 The port makes two arguments in its brief that I  
8 want to address. First, they argue that the plans and  
9 reports cut-off date only applies to plans and reports  
10 submitted pursuant to the 401 certification.

11 And this argument makes sense if you quit reading  
12 the prehearing order where the port asks you to. But the  
13 prehearing order goes on and the prehearing order  
14 anticipated that there could be plans and reports other  
15 than those on the November 15 list that might be offered,  
16 and states, "Even if noted on the list, Ecology and the  
17 port are prohibited from relying at the hearing upon any  
18 plan or report prepared after February 1, 2002."

19 The port also argues that while Mr. Riley, the  
20 principal author of the embankment model and the report  
21 discussing it, could have been deposed in either of I  
22 think three days following the production of his report,  
23 which came on Friday, February 15, after six o'clock.  
24 But, see, this is really a day late and a dollar short.  
25 There is no reason why this embankment model and plan

1           could not have been prepared two years ago. And we don't  
2           have any explanation for why. And Mr. Riley's deposition  
3           testimony is cited in our brief. He was apparently not  
4           asked, even asked to do any work on the embankment fill  
5           criteria until after the beginning of the year.

6           So you can see the inherent unfairness that would  
7           result if ACC were only given a few days to review a  
8           model and a report based on the model that took six weeks  
9           to develop and then they were only given three days to  
10          prepare for and then depose the author of this report.

11          The board's October 30 prehearing order made the  
12          ground rules clear. The respondents needed to identify  
13          plans and reports by November 15 and there would be an  
14          absolute cut-off of February 1 for plans and reports.

15          The 17 plans and reports were not produced by the  
16          February 1 cut-off date and the prehearing order was  
17          clear about the remedy. Respondents would be prohibited  
18          from relying on these plans and reports at the hearing,  
19          which means not only should these plans and reports not  
20          be admitted, the respondents shouldn't be able to testify  
21          as to the contents of these reports or present any other  
22          testimony based on the reports. Thank you. I think I've  
23          got a few minutes left for rebuttal.

24                        MS. COTTINGHAM: Did you need to add anything  
25                        before --

1 MR. POULIN: No, with respect to the time.

2 MR. PEARCE: Thank you, Miss Cottingham. This  
3 is iron curtain all right, in fact, they are trying to  
4 prevent the board from seeing relevant important evidence  
5 that came in before the discovery deadline, identified  
6 pursuant to the board's order before the discovery  
7 deadline, and none of these reports were done pursuant to  
8 the 401. These were all reports that were done, actually  
9 most of them aren't reports, there's two reports, other  
10 things are just documentary evidence. Others, they were  
11 all done in response to litigation and, in fact,  
12 Mr. Riley's report was done in response to the 404 as a  
13 request from the Corps of Engineers initially.

14 The board has already specifically rejected the  
15 appellant's position. The appellant's position is  
16 completely disingenuous given what happened at our  
17 prehearing conference. The prehearing order says,  
18 "Identify the reports and plans expected to be prepared  
19 pursuant to the 401 certification." And the rest of that  
20 paragraph refers to those reports and plans, things  
21 expected to be prepared pursuant to the 401  
22 certification.

23 We identified those in a November 15th letter to ACC  
24 and to the board. It identifies the things that are  
25 prepared pursuant to the 401 and when they're going to be

1 submitted.

2 So it's just the plans required by the 401 that this  
3 part of the prehearing order refers to. In fact, if you  
4 look at the text that we quoted from the prehearing  
5 order, that's at page 3 and 4 of our submittal, Ms.  
6 Marchioro was talking here, and she says, "It's confusing  
7 what ACC's talking about. What Miss Osborn is saying is  
8 what's required by the 401. Then if what you are asking  
9 about is what's required by the 401, with the exception  
10 of monitoring reports, then I think that's a" - there's a  
11 mistranscription here - "a fine set of documents."

12 It appears that what Mr. Stock is saying, which is  
13 the position they are taking again here at the last  
14 second, is anything that would be used to create  
15 additional support for reasonable assurance, that is, any  
16 report and plan. And that goes beyond what's required by  
17 the 401. And that's exactly what we have here, all these  
18 reports and plans that they're talking about are not  
19 required in the 401, they're done in response to this  
20 litigation.

21 And Ms. Marchioro goes on, "There will be expert  
22 reports and other documents created and those should not  
23 be required to be provided any time in advance of the  
24 final exhibits as far as -- unless we are going to have  
25 an expert report identification date, which we don't. We

1 have a final exhibit deadline in the prehearing order."  
2 And, Miss Cottingham, you said, "I would agree with  
3 that."

4 And that's what we relied on and that's what we  
5 believe the prehearing order says. This refers to the  
6 reports and plans that are conditions of the 401  
7 certification and we agree would be produced early,  
8 earlier than the final exhibit list, and all the other  
9 reports and plans and documentary evidence and expert  
10 reports and expert documents supporting our experts'  
11 opinions on the final exhibit list.

12 This is a de novo hearing. Except for that very  
13 small set of plans and reports that were required by the  
14 401, which we set an earlier deadline for, all evidence  
15 comes in that's on the final exhibit list subject to  
16 objections. Mr. Riley's report, for example, we had the  
17 exact same thing with ACC. They provided a report by  
18 Mr. Lucia the day before his deposition. We pushed his  
19 deposition back a couple of days to be able to examine  
20 that report and take it.

21 Mr. Riley's report came in. It was about ready when  
22 they took his deposition. We told ACC prior to the  
23 deposition, if you want to postpone this deposition so  
24 that you can review this report first, we're fine with  
25 that. They chose not to. They chose to go ahead and go

1 forward with the deposition. We've disclosed Mr. Riley's  
2 files, we have disclosed the Papadopoulos files, we have  
3 disclosed all of the reports. All of those were done  
4 prior to the discovery deadline, prior to the final  
5 exhibit list.

6 Mr. Riley's report is not prepared pursuant to the  
7 401, it's nowhere in the 401. They can't point you to a  
8 place in the 401 where the fill criteria assessment by  
9 Mr. Riley is required. The same for Mr. Kelley's report.  
10 They can't point you to the 401 to a place where that is  
11 required. There's a limited list in this November 15th  
12 letter that we sent to the board and all parties that  
13 says these are the reports and plans required in the 401,  
14 these are the things that are required to be disclosed  
15 earlier than the deadline for exhibits, and these are the  
16 things, these are the only things that this paragraph of  
17 the prehearing order applies to.

18 All the other documents that they're referring to  
19 were validly identified, they're in the final exhibit  
20 list, they were identified before the discovery deadline.  
21 The discovery deadline which, incidentally, was pushed  
22 out further at ACC's request. They're not required by  
23 the 401 and that's not what the prehearing order  
24 requires, but what appellants are proposing to do is that  
25 their experts be allowed to collect information,

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1            formulate opinions and reports and publish them all the  
2            way up to the discovery deadline, and the port and  
3            Ecology are not allowed that same benefit under the  
4            discovery rules.

5            The only thing that this section of the prehearing  
6            order dealt with were the conditions in the 401. You'll  
7            remember when we were talking about this, we were talking  
8            about the conditions in the 401 and the reports and plans  
9            that were required by the 401 to come in after the  
10           September publication of the 401.

11           That's a defined set of documents. They've all been  
12           produced prior to the deadlines in here. So I would urge  
13           the board to please deny this motion.

14           MS. COTTINGHAM: Does Ecology have anything to  
15           add?

16           MR. KRAY: No. We have submitted some  
17           material concurrent with the port's argument. I don't  
18           have anything in addition to add in regard to argument  
19           today.

20           MS. COTTINGHAM: Rebuttal.

21           MR. WITEK: I just have a few points I wanted  
22           to make. First is what does the rule apply to, and I  
23           think what we've heard and I think what we predicted that  
24           the rule only applies to plans and reports submitted  
25           pursuant to the 401. But if that were the case, then the



1           October 30 prehearing order could have stopped with the  
2           first part of the rule that we discussed. We wouldn't  
3           need to have gone on and said, "Even if noted on the  
4           list, Ecology and the port are prohibited from relying at  
5           hearing upon any" - uses the word any - "plan or report  
6           prepared after February 1, 2002."

7           The second point I wanted to make is now what we're  
8           hearing is, well, we weren't required to identify  
9           Mr. Riley's report until the final exhibit deadline,  
10          which would then give ACC no opportunity to review it and  
11          depose Mr. Riley about the contents of this report. So  
12          clearly that's not workable.

13          And then with the example of Pat Lucia, I think  
14          that's actually a very good example, and to steal a line  
15          from port counsel that the problem with this example is  
16          that it proves too much. Here Dr. Lucia of Geo Syntec  
17          was given the facts and data and things like that used in  
18          the December low-flow analysis obviously fairly late in  
19          the process, and was working very diligently to review  
20          and prepare his analysis of the low-flow plan. So it was  
21          understandable that Dr. Lucia wouldn't have a chance to  
22          complete his analysis until early February, just prior to  
23          the time that he was being deposed. And it's quite  
24          natural in that circumstance that the port should want to  
25          go ahead and put the deposition off for a few days and

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1           depose Dr. Lucia after he had finished his report, which  
2           was really just an evaluation of the port's original  
3           low-flow analysis.

4           In this situation, with the Riley report, ACC had no  
5           idea that we were going to see another model. And as I  
6           think we can see from the debate over the December 2001  
7           low-flow plan, groundwater modelling is not kid's stuff,  
8           it's sophisticated, it takes a lot of time to prepare  
9           for. And the port has offered no excuse for why it  
10          couldn't have done this report anytime earlier and no  
11          excuse for why it had to be done in January as opposed to  
12          Dr. Lucia who was working in January because the port's  
13          low-flow analysis wasn't even done until December.

14                 MR. PEARCE:    If I could respond to the new  
15                 allegation in his new argument.

16                 MR. WITEK:    Actually, I'm not quite finished  
17                 yet. Thanks.

18                 MS. COTTINGHAM:  Continue.

19                 MR. WITEK:    And, finally, I would like the  
20                 board, when it has a chance to look at or perhaps just  
21                 listen to the transcript of the prehearing conference,  
22                 and we've heard this part where Miss Marchioro questions  
23                 whether or not the plans and reports date would apply to  
24                 expert reports, and Miss Cottingham says, "I would agree  
25                 with that. You're looking at plans and reports that are

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1 required under the 401?" And that question was directed  
2 to Mr. Stock, who answered, "I am looking at that. I am  
3 also looking at the BMG case where, on the eve of the  
4 hearing, the project proponent submitted additional plans  
5 and ultimately the board used that as evidence there  
6 wasn't reasonable assurance at the time the 401 was  
7 issued."

8 And then Miss Cottingham said, "Well, I think if we  
9 do the February 1st, that gives you a month and a half to  
10 do some additional follow-up." And then Miss Osborn  
11 asked, "For the discovery cut-off date?" To which Miss  
12 Cottingham responded, "We haven't even gotten to all of  
13 that. It can be linked up later."

14 And it was in fact linked up later with this second  
15 provision in the October 30 prehearing order that I've  
16 been discussing.

17 Thank you.

18 MS. COTTINGHAM: I will give you just a second  
19 to respond.

20 MR. PEARCE: Mr. Riley's opinions were all  
21 disclosed to ACC in answers to interrogatories early on.  
22 Unlike ACC, we actually answered interrogatories  
23 substantively and we told them what Mr. Riley's opinions  
24 were going to be.

25 MR. STOCK: I object to that statement. That

1 is not right. We answered interrogatories.

2 MS. COTTINGHAM: Let's try to maintain some  
3 civility.

4 MR. PEARCE: So they knew exactly what  
5 Mr. Riley was about and they had ample opportunity to do  
6 discovery and Mr. Riley and all of Papadopoulos documents  
7 were disclosed to them. That's all I have.

8 Thank you.

9 MS. COTTINGHAM: I have a couple questions.  
10 Are any of the 17 documents on your list going to be  
11 relied on by Ann Kenny, Tom Luster, Amanda Azous, Dyanne  
12 Sheldon?

13 MR. WITEK: I don't believe so.

14 MS. COTTINGHAM: Unless you have any  
15 questions.

16 JUDGE LUCAS: I do not.

17 MS. COTTINGHAM: I am going to also take a  
18 look closely again at this over the lunch hour and  
19 hopefully render a decision shortly after lunch.

20 And with that, I think I would like to take about a  
21 10-minute recess so that we can get everybody in here and  
22 organized. And I would like to remind you that the last  
23 two rows in the hearing room are reserved for the public  
24 and the attorneys and paralegals and others should move  
25 forward.

**AR 055110**

1 MR. STOCK: Miss Cottingham, one thing, I  
2 don't know whether you notice, the paralegals were able  
3 to get the other deposition exhibits that were missing  
4 yesterday and they're now behind you.

5 MS. COTTINGHAM: Okay. Thank you. Off the  
6 record.

7 (Whereupon, a recess was taken.)

8 MS. COTTINGHAM: Good morning. Be seated.

9 We'll go back on the record. And, Miss Kenny,  
10 you're still under oath.

11

12 ANN KENNY, having been previously duly sworn on oath or  
13 affirmed to tell the truth, the whole truth and nothing  
14 but the truth, testified as follows:

15

16 MS. COTTINGHAM: Go ahead and start the  
17 clock.

18

19

EXAMINATION

20

BY MS. MARCHIORO:

21 Q. Good morning, Miss Kenny. Yesterday, Mr. Stock asked you  
22 if, in theory, the NPDES permit could amend the 401  
23 certification to lessen the requirements in the 401. Do  
24 you recall that line of questioning?

25 A. Yes, I do.

**AR 055111**

1 Q. What do you really expect to happen?

2 A. I expect that the water quality program will be issuing a  
3 revised NPDES permit that has stronger standards in it  
4 than the one that is currently.

5 Q. And what's that expectation based on?

6 A. That's based on information given to me by Kevin  
7 Fitzpatrick in the water quality program.

8 Q. There was a line of questioning with regard to the  
9 facilitated meetings. What was the purpose of the  
10 facilitated meetings?

11 A. The purpose of those meetings was to compile a complete  
12 list of the issues that needed to be addressed by the  
13 port and a forum for Ecology to sit down with the port,  
14 and vice versa, to discuss those issues, to go through  
15 the technical requirements, the regulatory requirements,  
16 so that the port had a very clear idea of what Ecology  
17 was looking for and what the port would need to do to  
18 satisfy Ecology's requirements.

19 Q. Is there any documentation with respect to those  
20 facilitated meetings?

21 A. Yes. All of those meetings were documented in notes  
22 prepared by primarily Kate Snider of Floyd & Snider and  
23 another set of notes were prepared by Rachel McCrae of  
24 Floyd & Snider.

25 Q. I recall you testifying yesterday that there are

1 conditions in the 401 certification; is that correct?

2 A. That's correct.

3 Q. And what effect on reasonable assurance does a condition  
4 requiring a future submittal have?

5 A. Reasonable assurance is, as I said yesterday, and as is  
6 written in my testimony, is a two-step process. We look  
7 first at the entirety of the project before us and we  
8 make a determination that a project is going to comply  
9 with state water quality standards. And where there is  
10 uncertainty or we need additional information, we will  
11 put conditions in the 401 certification. And reasonable  
12 assurance, then, is based on the presumption and  
13 Ecology's ability to enforce those conditions. So the  
14 port needs to comply with those conditions, they need to  
15 fulfill the terms of the conditions. If they fail to do  
16 so, Ecology has enforcement capacity to deal with the  
17 issue.

18 Q. Is that the same with respect to any 401 certification  
19 issued by the Department of Ecology?

20 A. Absolutely the same standard.

21 Q. Does the 401 certification require monitoring?

22 A. Yes, it does.

23 Q. And why does it require monitoring?

24 A. Monitoring is allowed under section 401(D) of the Clean  
25 Water Act. It's also a very practical, logical way to

**AR 055113**

1           verify the assumptions of the plans that we have  
2           approved. We want to be sure that when we approve a  
3           wetland mitigation plan that has a certain design and  
4           elevations for plants and assumes a certain amount of  
5           water, that when those plants are planted and the grading  
6           is done, it's done appropriately, so that's part of doing  
7           as-built. We want to make sure the hydrology is there so  
8           that the plants grow. And the real key thing is that  
9           monitoring allows us to make midstream corrections if a  
10          problem is identified. And then Ecology is there, we  
11          will provide direction to an applicant as to what they  
12          need to do to correct any problem.

13        Q. Is it unusual to have monitoring requirements in a 401  
14          certification?

15        A. It's absolutely standard in every 401 certification.

16        Q. What happens to reasonable assurance if a condition of a  
17          401 certification is not complied with?

18        A. Reasonable assurance doesn't disintegrate because one  
19          condition of a 401 is not complied with. What we will do  
20          is we will look at that particular situation, and as is  
21          described in my testimony, we work with the applicant to  
22          try to get their voluntary compliance to fulfill the  
23          terms of the condition. If that fails, we can and will  
24          and have proceeded to use our own enforcement authority  
25          under the state's water pollution control laws. That's

**AR 055114**



1 RCW 90.48. And as was mentioned yesterday, because the  
2 401 certification is adopted in whole as a part of the  
3 404 certification, we immediately will notify the Army  
4 Corps of Engineers if an applicant has failed to comply  
5 with a condition of the 401.

6 Q. Does inclusion of the conditions in the 401 certification  
7 mean that Ecology does not have reasonable assurance?

8 A. No, absolutely not.

9 Q. Why not?

10 A. Because we have this entire enforcement mechanism to  
11 compel compliance with the conditions. We've already  
12 made a determination that the project as a whole is  
13 feasible, it's implementable, it can be done. The  
14 conditions insure that it's done properly and our  
15 enforcement authority is there to compel that compliance.

16 Q. Do you recall being asked questions with respect to the  
17 natural resources mitigation plan?

18 A. Yes, I do.

19 Q. And that's in condition D of the 401 certification?

20 A. (Nods head affirmatively).

21 Q. Is that right?

22 A. That's correct.

23 Q. Are the elements of condition D the types of issues that  
24 wetland specialists deal with on a routine basis?

25 A. Yes, they are.

**AR 055115**

1 Q. And then you were directed to attachment B to the 401  
2 certification; is that correct?

3 A. That's correct.

4 Q. And who wrote attachment B?

5 A. The language for attachment B was prepared by Katie  
6 Walter, who is a wetland specialist under contract to  
7 Ecology.

8 Q. And what did attachment B include?

9 A. Attachment B was simply a list of minor plan sheet  
10 corrections that Miss Walter had identified as a process  
11 of her very thorough and detailed review. She identified  
12 particular items that she saw were missing in the plan  
13 sheets or weren't clear, and then Ecology sat down and we  
14 met with the port and discussed those changes.

15 The reason they were included as an attachment --  
16 I'll back up a little bit. We discussed the changes with  
17 the port and the port said, oh, yeah, we missed that  
18 particular detail, or, oh, yes, you're right, you know,  
19 the detail for root rot wad should have been somewhere  
20 else in the alignment of the creek. And so they agreed  
21 that these were all changes that were reasonable and  
22 should be made. The reason I included it as an  
23 attachment was so that we could insure that those changes  
24 were made. We required in the certification that the  
25 NRMP be amended and the plan sheets be included to show

**AR 055116**

1           those particular changes, but they were very minor in  
2           nature.

3           Q.   Have the changes in appendix B been made to the revised  
4           NRMP?

5           A.   I believe they have.

6           Q.   I am going to ask you questions about fill criteria.  
7           Has Ecology every issued a 401 certification with numeric  
8           fill criteria?

9           A.   Not to my knowledge.

10          Q.   Are you aware of any 401 certification with numeric fill  
11          criteria?

12          A.   No, I am not.

13                       MS. MARCHIORO:   I have nothing further.

14                       MR. REAVIS:    I have just a couple questions.

15

16

EXAMINATION

17

BY MR. REAVIS:

18          Q.   Miss Kenny, I wanted to ask you something that was a  
19          little confusing to me yesterday.  As I read your  
20          prefiled testimony, what you're saying is, in August you  
21          had reasonable assurance when the first 401 was issued,  
22          and in September you had reasonable assurance when the  
23          second 401 was issued.  And then in response to some of  
24          Mr. Stock's questions, you said, well, yes, but we need  
25          these other documents to have reasonable assurance, some

**AR 055117**

1 of which you don't have. Can you explain for us those  
2 two different concepts?

3 A. Do you want me to discuss the differences between the  
4 August and September or do you want -- I am a little  
5 confused as to your question.

6 Q. I guess what I'm getting at is, the documents that  
7 Mr. Stock was asking you about that you don't have  
8 here --

9 A. Right.

10 Q. Does the fact that you don't have those mean that you  
11 lack reasonable assurance today?

12 A. No.

13 MR. STOCK: I am going to object to the over  
14 broad nature of the question. If Mr. Reavis has a  
15 particular question in response to one of the questions  
16 where Miss Kenny said that Ecology needed that document  
17 for reasonable assurance.

18 MS. COTTINGHAM: Why don't you restate your  
19 question.

20 MR. REAVIS: I'm trying to avoid having to go  
21 through the entire couple of hours of those questions,  
22 but --

23 Q. Let me ask you first with regard to attachment B. Many  
24 items on that list you said that you needed to have to  
25 have reasonable assurance. Are you saying that not

**AR 055118**

1           having those means that you don't have reasonable  
2           assurance today?

3       A. I'm not saying that at all. As a matter of fact, we have  
4       received the revised NRMP. It does include, according to  
5       a matrix that Mr. Kelley, who is the lead wetland  
6       specialist for the port, has provided Ecology with a  
7       matrix of where all of the changes in the 401 that were  
8       required were made in this revised NRMP. So we're in the  
9       process of going through that revised document and  
10      verifying that. So I fully believe the port's in  
11      compliance with the condition to submit the revised  
12      report and reasonable assurance still stands.

13     Q. Let me ask you another question about an issue that you  
14     discussed with Mr. Stock. And that's found on page 8 of  
15     the Exhibit Number 1. And let me just see if you recall  
16     this, and if you don't, I'll pull out the exhibit. It's  
17     item 0 relating to the Vacca Farm mitigation site. It  
18     says revised table 5.1-7 of the NRMP, July 31st, 2001,  
19     final performance standards shall have a note added that  
20     reads, quote, observable surface flow must be present in  
21     the created channel at all times.

22                 Do you remember that?

23     A. I do.

24     Q. Now, what is necessary for the port to comply with that  
25     particular condition?

**AR 055119**

1 A. All that is necessary for that particular condition to be  
2 fully complied with is for the port to change that table  
3 and add that language.

4 Q. So insert this sentence into that table and that meets  
5 this condition?

6 A. That's correct.

7 Q. So do you have any question about whether or not that is  
8 feasible for the port to implement?

9 A. I'd say it's highly feasible for them to implement that.

10 Q. And so the lack of that sentence in the first NRMP, is  
11 there any reason to believe that you lack reasonable  
12 assurance that this condition will be complied with?

13 A. No.

14 MR. REAVIS: I think that's all I have. Thank  
15 you.

16 MR. STOCK: I have a few follow-up.

17

18 EXAMINATION

19 BY MR. STOCK:

20 Q. Miss Kenny, have you ever signed a 401 certification?

21 A. I've never signed a 401 certification because I don't  
22 have the authority to do that.

23 Q. You don't have signature authority to sign a 401  
24 certification, do you?

25 A. That's correct.

**AR 055120**

1 Q. You said that 401(D), are you referring to the Clean  
2 Water Act section 401(D)?

3 A. That's correct.

4 Q. And if I understood your testimony, you said that section  
5 401(D) requires monitoring?

6 A. It allows monitoring, I believe, is what it says.

7 Q. Is it also your understanding that section 401(D) of the  
8 Clean Water Act requires effluent limitations specified  
9 in the 401 certification?

10 A. I think what it says is that it may require -- effluent  
11 limits may be established. I don't think there is an  
12 affirmative requirement to establish effluent limits.

13 Q. And there are no effluent limitations in this 401  
14 certification, are there?

15 A. I know that we did establish some boundaries in the  
16 operational, I'm sorry, the construction stormwater --

17 Q. There are no numeric effluent limitations in this 401  
18 certification, are there?

19 MR. STOCK: Miss Cottingham, I am worried about  
20 the long pause in answering a question counting against  
21 our chess clock. If she can't answer the question, then  
22 she should just say, "I don't know" or "No."

23 MR. REAVIS: I think he asked a question that  
24 requires her to review the entire document.

25 MR. STOCK: If she doesn't know by now what's

**AR 055121**

1 in that 401 certification she wrote --

2 MS. COTTINGHAM: I'm going to overrule your  
3 objection. You did ask her a question that is causing  
4 her to thumb through.

5 Q. (Continuing By Mr. Stock) The question is, there are no  
6 numeric effluent limitations in that 401 certification  
7 that you wrote, are there?

8 A. Not per se.

9 Q. You said that you expected a future NPDES permit to have  
10 stronger requirements than what's in the 401. Is that  
11 how you responded to Miss Marchioro's question?

12 A. I don't believe that was her question. Her question was  
13 whether or not any subsequent NPDES permit for industrial  
14 waste water would be stronger. That I believe is what  
15 she was referring to.

16 Q. Why aren't those stronger standards in the 401  
17 certification?

18 A. Well, I believe that I can answer that by saying that the  
19 way we've structured our 401 review and the we call the  
20 402 review, which relates to the NPDES permit that the  
21 port has, is that we have deferred that referral to our  
22 water quality program to do that analysis.

23 Q. You agree that you as the author of the 401 certification  
24 could have put in the 401 certification that the  
25 certification could only be superseded by a future NPDES

**AR 055122**



1 permit, but only if those standards were stronger?

2 A. In theory, I could have put that language in.

3 Q. Just one final question. Have you ever issued a 401  
4 certification -- in response to Miss Marchioro's  
5 questions, you said that Ecology had never issued a 401  
6 certification that included fill criteria. Do you recall  
7 that testimony?

8 A. I do.

9 Q. Have you ever issued a 401 certification where 20 million  
10 cubic yards of fill was being imported on to a site?

11 A. I don't believe any 401 reviewer in the state has ever  
12 reviewed a project of this nature with that amount of  
13 fill.

14 MR. STOCK: No further questions.

15 MS. COTTINGHAM: Any questions from the board?

16 MR. JENSEN: No.

17 MR. LYNCH: I have a couple questions.

18

19 EXAMINATION

20 BY MR. LYNCH:

21 Q. Thank you for your testimony the last couple days. I  
22 just have a couple questions so I can help understand  
23 your testimony a little bit better.

24 Have you ever participated in a 401 certification  
25 approval where an NPDES permit could subsequently modify

**AR 055123**

1 the 401 certification?

2 A. Most of the permits that I've issued have not had an  
3 active NPDES permit, an industrial permit in place.  
4 They've been primarily construction permits. They've  
5 been required to obtain a temporary NPDES permit for  
6 discharges, storm water, but I haven't personally dealt  
7 with one where there's been an existing NPDES permit in  
8 place.

9 Q. And my second question pertains to monitoring time lines.  
10 I was wondering why a time period of eight years was  
11 chosen for the surface water and groundwater monitoring  
12 plan and also for the potential transport of  
13 contaminants. Is eight years standard for a large  
14 project or, I guess, I'm just wondering why eight years  
15 was chosen?

16 A. The eight years was chosen because that is really  
17 reflective of the life span of the 401. The 401 only  
18 exists in the context of the 404 permit. It has no life  
19 in and of itself. What we did when we issued this  
20 certification, we issued a 401 certification and a joint  
21 administrative order under the state's water pollution  
22 control laws, and that's again RCW 90.48. And so there's  
23 a life span to this document. The 404 is a construction  
24 permit.

25 And as I said at my original deposition in December,

**AR 055124**

1 we felt that these changes were reasonable to provide  
2 greater clarity to the reality of the limited duration of  
3 the 404. And in this case, the 404 is only being issued,  
4 when it's issued, if it's issued, would only exist for  
5 seven years. The norm for a 404 is three. And we've  
6 given this 401 a life span of seven years.

7           Regardless of the life span of the 401, the state  
8 continues to have enforcement authority under our water  
9 pollution control laws to insure that the port and their  
10 discharges are meeting state water quality standards. So  
11 my expectation is that we are going to have monitoring  
12 reports, we're going to know over an 8-year period if a  
13 problem is showing up in that monitoring data. And, as I  
14 said yesterday, if there is a problem, you know, we've  
15 said it was monitoring for a duration of no less than  
16 eight years. If there is a problem, well, if there's a  
17 problem, first we'll be requiring the port to correct the  
18 problem or treat the water, or, you know, deal with it  
19 that way, and we can require additional monitoring.

20 Q. Thank you.

21           MS. COTTINGHAM: Any other questions?

22           MR. LYNCH: No.

23           MS. COTTINGHAM: I have a couple of questions.

24           ////

25           ////

**AR 055125**

1 EXAMINATION

2 BY MS. COTTINGHAM:

3 Q. Did Ecology or does Ecology ever consider issuing draft  
4 401 certificates prior to the final in the chance of  
5 ironing out any of the operational difficulties?

6 A. In my history with the department, we have never issued a  
7 draft 401 certification. It's not like the process where  
8 under the NPDES permit a draft is put out for public  
9 hearing and comment. And part of the reason is because  
10 we don't want to be in the position of negotiating with  
11 the applicant what the terms of our permit is going to  
12 say. So we issue the permit and occasionally there are  
13 concerns, sometimes the conditions don't make any sense,  
14 and an applicant will come back and they need  
15 clarification. And, in that case, we try to provide that  
16 so long as we feel that the change does not affect our  
17 decision on reasonable assurance, it doesn't lessen the  
18 standard. We try to be reasonable in how we approach  
19 those changes.

20 Q. Thank you. I have a question, and I need to figure out  
21 what exhibit it's related to. I believe it's related to  
22 Exhibit 1. Is that what you have in front of you?

23 A. Mm-hmm (witness nods head affirmatively).

24 Q. I think it's page 18. You testified about the issues  
25 with the allowable fill sources and the prohibited fill

**AR 055126**

1 sources down at the bottom of page 18. If a pit is  
2 certified, could the rock, gravel, from that pit still be  
3 prohibited if it was contaminated or if it had been  
4 remediated? These aren't mutually exclusive lists?

5 A. No. No matter what the source, and there are only three  
6 sources, they all have to go through the process outlined  
7 in the first part of the condition to do the site  
8 background research, which is that phase 1 assessment,  
9 and then phase II they actually go in and do sampling.  
10 And if, through that process, fill from any of those  
11 sources is determined to be contaminated, it can't be  
12 used. And even if it's gone through a remediation  
13 process, it cannot be used.

14 MS. COTTINGHAM: Thank you. Are there any  
15 questions as a result of the board questions?

16 MR. STOCK: I do not have any follow-up.

17 MS. MARCHIORO: No.

18 MR. POULIN: No, thank you.

19 MS. COTTINGHAM: You're excused. You will  
20 most likely be called back by Ecology as a direct  
21 witness. You may call your next witness. And is the  
22 clock on the right place?

23 MR. POULIN: Yes.

24 ////

25 ////

**AR 055127**

1           THOMAS R. LUSTER, having been first duly sworn on oath or  
2 affirmed to tell the truth, the whole truth and nothing  
3 but the truth, testified as follows:

4

5

EXAMINATION

6

BY MR. EGLICK:

7

Q. Could you state your full name and address for the  
8 record, please.

8

9

A. My name is Thomas Ray Luster. I live at 3986 23rd Street  
10 in San Francisco, California.

10

11

Q. Okay.

12

MS. COTTINGHAM: You're going to have to speak  
13 up. The microphone does not broadcast, it's just hooked  
14 to the recorder.

14

15

Q. (Continuing By Mr. Eglick) In the exhibit notebook in  
16 front of you, Mr. Luster, could you look at Exhibit 200,  
17 please. And just to save time while you're looking it  
18 up, I'll ask, that's your curriculum vita, isn't it?

18

19

A. It's a current copy of my resume', yes.

20

Q. What's your current position?

21

A. I serve as staff to the California Coastal Commission,  
22 which is a 12-member appointed body in the state of  
23 California appointed by the governor and the head of the  
24 state senate and assembly.

24

25

Their purpose is to review proposed development

**AR 055128**

1 along the California coast for compliance with the  
2 California Coastal Act. Most of my job requires  
3 reviewing proposed development in energy ocean resources  
4 and water quality area. Examples include off-shore oil  
5 leases, onshore oil leases, power plants along the coast.  
6 I'm also working on policy for desalination in  
7 California. A part of my job is to insure compliance  
8 with NPDES permit requirements on off-shore oil  
9 platforms, things like that.

10 Q. And your job classification is environmental scientist;  
11 is that correct?

12 A. That's correct.

13 Q. Okay. What was your prior position?

14 A. Prior to that, I worked at Department of Ecology. I was  
15 the senior 401 technical and policy staff for the  
16 department.

17 Q. And how long did you work with Department of Ecology,  
18 from what year to what year?

19 A. From 1989 until last January.

20 Q. Okay. And look on the second page of Exhibit 200, your  
21 resume', will you, please. Do you see where it says  
22 professional honors, achievements and memberships?

23 A. Yes.

24 Q. And I note one you have there is the agency's  
25 environmental stewardship award in 1997. Is that a unit

**AR 055129**

1 citation that's given to the whole department or what was  
2 that?

3 A. That's generally, I believe it's once a year, given to a  
4 staff member who best exemplifies Ecology's goal and  
5 mission station.

6 Q. And in 1997 that was given to you?

7 A. Correct.

8 Q. Okay. Your educational training is also listed here on  
9 page 2; is that correct?

10 A. Yes.

11 Q. Just a few questions I wanted to ask you. I think  
12 someone asked Miss Kenny how many 401s she had written.  
13 How many 401s have you written?

14 A. Something over 700.

15 Q. Okay. And, by the way, have you ever read a 404  
16 decision?

17 A. Yes, several.

18 Q. And have you ever seen a 404 permit?

19 A. Yes.

20 Q. Okay. And have you ever had meetings with Army Corps of  
21 Engineers staff about issues relating to the Clean Water  
22 Act?

23 A. Quite a few.

24 Q. There was some mention made yesterday about a  
25 regionalization of the 401 process in Ecology. Were you

**AR 055130**



1 here for that testimony?

2 A. I don't recall. I don't think I was here for that.

3 Q. Let me ask you a question. Did there come a time when  
4 the 401 process was regionalized in Ecology?

5 A. Correct. That was several years ago. Originally all the  
6 401 staff were housed at headquarters. Due to some  
7 reorganization, many of the staff were moved or many of  
8 the functions of 401 were moved to the regional office.  
9 Some remained at headquarters and some were in the  
10 regions.

11 Q. Were any 401 applications that you were working on part  
12 of the regionalization process and reassigned from you as  
13 part of that process?

14 A. No. For the most part, I believe if headquarters staff  
15 had started working or had done significant work on an  
16 active 401 proposal, they maintained that review. As new  
17 regional staff were hired and as new applications came in  
18 and as the new staff were trained, they were assigned the  
19 newer permit requests.

20 Q. Could you look at Exhibit 201 for a moment, please. And  
21 does this represent the fact that you had signature  
22 authority for 401 decisions for the department?

23 A. Yes, it does.

24 Q. So, in other words, I think a similar question was asked  
25 of Miss Kenny, you could actually sign a 401 decision and

**AR 055131**

1 issue it; is that correct?

2 A. Correct.

3 Q. With regard to the third runway 401 application, did you  
4 ever get assigned to that?

5 A. Yes, originally back in, I believe, 1996, perhaps.

6 Q. Okay. And when did you stop being the department's --  
7 did you ever stop being the department's lead  
8 representative on that?

9 A. Yes, that was in October of 2000.

10 Q. So from 1996 to October of 2000, you were the  
11 department's lead representative on the various third  
12 runway 401 applications?

13 A. Correct.

14 Q. Did you ask to be removed from that assignment?

15 A. No.

16 Q. Could you look at Exhibit 202, please.

17 MR. KRAY: Before the question is asked with  
18 regard to the exhibit, I will certainly endeavor to try  
19 to do this and I would ask other counsel to, we have got  
20 a fairly extensive list and we have objections in here.  
21 It would be helpful when we flip to it if we have a very  
22 brief pause so we can get to it and keep up.

23 MR. EGLICK: I thought --

24 MR. KRAY: I'm not taking fault with your  
25 question at this time, Mr. Eglick, I am merely noting it

**AR 055132**

1 for the future.

2 MR. EGLICK: We'll see how it goes.

3 Q. Looking at Exhibit 202, which is an Ecology personnel  
4 record, isn't it, Mr. Luster?

5 A. Several documents having to do with personnel matters,  
6 yes.

7 Q. And these are ones you got from the Department of  
8 Ecology?

9 A. Correct.

10 Q. And do these include what you understand to be what your  
11 job description was at the department with regard to 401?

12 A. Yes, the third page of this exhibit.

13 Q. Do you see where it says "Summary" on the third page of  
14 Exhibit 202?

15 A. Yes.

16 Q. Could you read the first sentence after the line  
17 "Summary" into the record, please.

18 A. "Serves the senior expert to the shorelands environmental  
19 assistance program and the Department of Ecology on  
20 technical and policy issues related to section 401 of  
21 federal Clean Water Act, CWA, Coastal Zone Management  
22 Act, CZMA, consistency determinations and coordinated  
23 state responses under executive order EO 8118."

24 Q. Could you look down at where it says "Project Management"  
25 and could you read the second sentence of that section,

**AR 055133**

1 please, same page.

2 A. "Determines project compliance with state environmental  
3 regulations and prepares the final state position and  
4 necessary conditions on these projects under section 401  
5 of the CWA, EO 8118 and the U.S. Fish & Wildlife  
6 Coordination Act and prepares state response on CZMA  
7 consistency."

8 Q. Okay. By the way, just to ask you about the last page of  
9 this exhibit for a moment, you see where it says  
10 "Reviewer's Signature."

11 A. Yes.

12 Q. Whose signature is that, do you recognize it?

13 A. That's Gordon White. He was at the time and is currently  
14 the head of the shorelands environmental assistance  
15 program.

16 Q. And he was the one who signed the 401 here?

17 A. Yes.

18 Q. Can you explain what the relationship is between a 401  
19 and 404 as was administered when you were at the  
20 department?

21 A. A 401 only exists when a 404 is needed. Section 401 of  
22 the Clean Water Act provides an opportunity for the state  
23 to weigh in on proposed projects that require a permit, a  
24 404 permit from the Corps of Engineers. Once that  
25 threshold is crossed that a 404 and 401 are needed, then

**AR 055134**

1 the state reviews the proposal for all applicable  
2 requirements of state aquatic resource protection  
3 regulations. And when it issues a 401 -- well, its 401  
4 decision can either be to approve, deny or condition a  
5 project. That decision is binding on the Corps of  
6 Engineers in their 404 decision, and conditions of the  
7 401 become conditions of the Corps' decision.

8 Q. And, to your understanding, as the program was  
9 administered when you were at the department, was a 401,  
10 absent something like an injunction or a stay, was a 401  
11 retrievable from the Army Corps?

12 MR. KRAY: Objection as to the term  
13 retrievable.

14 Q. (Continuing By Mr. Eglick): Well, could you tell the  
15 Army Corps, unless there was some legal action about the  
16 401, could you just tell the Army Corps you didn't need  
17 it anymore, to issue a 401?

18 A. Not in that sense. There are some very limited  
19 circumstances where a 401 can be reassessed, but I can't  
20 recall offhand that we did that ever.

21 Q. Could you take a look, if you would, at Exhibit 216, and  
22 can you explain what it is and how you happened to  
23 prepare it?

24 A. This is an email with a memo attached that I wrote in  
25 mid-October 2000, addressing a number of issues that I

**AR 055135**

1 believed had not been resolved adequately for purposes of  
2 the 401 review in relation to this proposed project. It  
3 went into detail on the various issues and some of the  
4 justification for my concern. I wrote this in large part  
5 due to a number of these issues I believed had not been  
6 adequately addressed during the various meetings that had  
7 been facilitated between Ecology and the port, the Kate  
8 Snider meetings I guess they're being referred to.

9 Q. Those were the meetings with the facilitator that was  
10 paid by the port?

11 A. Correct.

12 Q. And I think you have said you were reassigned from the  
13 third runway project. This email has a date of October  
14 18th on it, do you see, Exhibit 216. When were you  
15 reassigned from the third runway project?

16 A. I believe it was shortly after this email. I think I was  
17 still the Ecology's representative of the 401 when I  
18 wrote this.

19 Q. Okay. Thank you. Miss Kenny was just addressing, and I  
20 know you do in your testimony, the requirements of  
21 401(D), and I was wondering if you could explain what the  
22 department's program on 401(D) consisted of when you were  
23 at the department.

24 A. I don't have the full citation in front of me, but 401(D)  
25 essentially says any certification issued pursuant to the

**AR 055136**

1 section 401 shall include effluent limitations and  
2 monitoring necessary to show that water quality standards  
3 would be met.

4 Q. And can you explain what the significance of that was in  
5 terms of how you administered the 401 program?

6 A. For purposes of the 401 program, up until the last few  
7 years, we depended on, for the most part, compliance with  
8 the Ecology stormwater manual as a surrogate for that  
9 condition essentially. At the time we believed that the  
10 compliance with the stormwater manual met compliance with  
11 the water quality standards. After discussion with staff  
12 in the water quality program two or three years ago, we  
13 were told that compliance with the manual was not meant  
14 to insure compliance with the standards. And at that  
15 point, we started approximately two-year-long negotiation  
16 process between the 401 staff and the water quality staff  
17 on how to address that shortfall of the stormwater  
18 manual.

19 Q. Now, have you had a chance to review the 401 that the  
20 department has issued that we're here appealing today?

21 A. Yes, I have.

22 Q. From your review, is the shortfall, as you just put it,  
23 addressed in the 401 issued to the Port of Seattle?

24 MR. KRAY: Objection, vague.

25 MS. COTTINGHAM: Sustained.

**AR 055137**

1 Q. (Continuing By Mr. Eglick): Is the shortfall in  
2 compliance with 401(D) addressed in the 401 issued to the  
3 Port of Seattle?

4 A. No, it's not. There are no effluent limitations in the  
5 401 other than a general statement that water quality  
6 standards will be complied with, and dependence on an  
7 NPDES permit that does not include specific criteria. So  
8 I would say the 401 issued falls short of the requirement  
9 of 401(D).

10 Q. And that's section 401(D) of the Clean Water Act?

11 A. Correct.

12 Q. Which is part of what the 401 certification is about; is  
13 that correct?

14 A. Correct.

15 Q. With regard to this idea of compliance with water quality  
16 standards, when you were administering the program and  
17 determining compliance with water quality standards, did  
18 you have to look at what the nature of the classification  
19 was for the waters in question?

20 A. Yes, that was generally a part of the review.

21 Q. So is there a classification system?

22 A. Yes. In WAC 173-201-030, and the subsections, it  
23 describes classifications for AA, A, B and C waters along  
24 with lake class waters, and they each have different sets  
25 of characteristic uses and specific narrative or numeric

**AR 055138**



1 criteria that apply to each of those classes.

2 Q. And with regard to the water bodies for the -- are you  
3 familiar with the water bodies at issue for the third  
4 runway project's 401?

5 A. Yes, I am.

6 Q. And can you tell us what those are, what they're  
7 classified at?

8 A. All the streams are classed AA.

9 Q. Is that the best?

10 A. That's the highest class, yes.

11 Q. And does that have a particular standard attached with it  
12 that would be different than grade Z or whatever you said  
13 was the low?

14 A. Yes. May I refer to the standards --

15 Q. Sure.

16 A. -- to answer that.

17 MR. REAVIS: So we are on the same page, can  
18 we get an identification of which standard the witness is  
19 looking at.

20 A. I'm looking at my copy of WAC 173-201A.

21 MS. COTTINGHAM: Do you need some water,  
22 Mr. Luster?

23 THE WITNESS: I have some, thank you.

24 A. In section 030 of the standards, the various  
25 classifications are described, and the first sentence

**AR 055139**

1 generally of each class describes what's expected of  
2 water bodies within that classification. The class AA --

3 Q. If I could just interrupt, I believe that's Exhibit 5.

4 MR. KRAY: Thank you, Mr. Eglick.

5 A. Class AA is described as extraordinary and states, "Water  
6 quality of this class shall markedly and uniformly exceed  
7 the requirements for all or substantially all uses."

8 Class A is described as excellent and the  
9 description is the same as for class AA.

10 Class B and C recognize that those are lower-quality  
11 waters and their general characteristic is described as  
12 somewhat less. "Water quality of this class shall meet  
13 or exceed the requirements for most uses." That's for  
14 class B. Class C is described as "Water quality of this  
15 class shall meet or exceed the requirements of selected  
16 and essential uses."

17 So based on that and other parts of this subsection,  
18 class AA is clearly meant to fully support the beneficial  
19 uses in place.

20 Q. When you were the department's lead on the airport  
21 project, did you have an understanding of what the scope  
22 of the 401 certification would be, if one were issued?

23 A. Yes, I believe so.

24 Q. And what did you understand the scope would be?

25 A. Well, there are a couple different ways to define the

**AR 055140**

1 scope. Section 401(A) of the Clean Water Act describes  
2 that the certification is issued for the construction and  
3 operation of the facility. In this case, the facility  
4 would be SeaTac Airport. Also, water quality standards  
5 require Ecology to look at direct, indirect and  
6 cumulative impacts. I believe you read into the record  
7 yesterday the citation on the Elkhorn decision, the  
8 Supreme Court decision on the extent of review.

9 Q. I actually read into the record Ecology's brief on that  
10 which won the case. Go ahead.

11 A. Okay. So those three things together help to define the  
12 facility. Also, Ecology's practice over the past number  
13 of years has been to look at the facility in its  
14 entirety. If there are parts of the facility that are  
15 integrated with the areas being directly affected by  
16 wetland fill, those elements of the project are  
17 incorporated into the 401 review. So that all serves as  
18 a basis for defining project scope.

19 Q. I know that you addressed some particulars of project  
20 scope on page 96 of your prefiled testimony, but I want  
21 to ask you about one in particular that I think was  
22 brought up yesterday. Did you have any understanding  
23 when you were the department's lead on the port's 401  
24 applications as to the status of work with regard to SR  
25 509 in terms of the scope of the project?

**AR 055141**

1 A. There are two separate elements with the 509 area. One  
2 was the port's temporary construction interchange that  
3 they built in order to bring fill to the third runway  
4 area. That was considered part of the scope of the 401  
5 review. The other part of 509, the proposed extension of  
6 509 to an area south of the airport, Ecology had been  
7 reviewing that. Well, originally we were wondering  
8 whether or not that should be included as a cumulative  
9 impact. As time went on and that 509 extension started  
10 being less of a speculative project and more certain - I  
11 believe it's under going SEPA review right now - I  
12 believe that Ecology should have included that extension  
13 as part of the cumulative impact analysis for this  
14 proposed project.

15 Q. Are you familiar with the term 404 projects as a term of  
16 art in the state's 401 certification review?

17 A. The only reference to a 404 project is that the need for  
18 404 serves as the threshold for 401 review, and once that  
19 threshold is crossed, Ecology reviews the proposed  
20 project, the facility in its entirety.

21 Q. To your knowledge, when you were doing those 700 401s for  
22 the Department of Ecology, did you ever issue a 401  
23 certification that was limited to, quote, 404 projects,  
24 quote?

25 A. I don't know. No, I didn't. I've never really seen that

**AR 055142**

1 term used as a limiting factor in 401 review.

2 Q. Were you here this morning for Miss Kenny's testimony  
3 concerning monitoring and its role in providing  
4 reasonable assurance?

5 A. For part of it, yes.

6 Q. And you've read her prefiled testimony as well, haven't  
7 you?

8 A. Correct.

9 Q. Can you explain what your understanding is of how the 401  
10 program approached monitoring as part of reasonable  
11 assurance or not, during your tenure with Ecology?

12 A. Monitoring was generally required as a condition of 401.  
13 It's part of step 2 of the reasonable assurance process  
14 described in the 401 desk manual, and it's primarily  
15 meant to confirm that Ecology's initial decision that it  
16 had reasonable assurance would be met. For example, once  
17 Ecology determined that a wetland mitigation plan was  
18 adequate and met the requirements, it had sufficient  
19 detail to determine there would be hydrologic support to  
20 the wetland, that the planting plan was adequate, that  
21 sort of thing, the monitoring plan was generally required  
22 to show that the plan was, the mitigation plan would be  
23 implemented as Ecology understood it to be described.

24 Q. Was monitoring ever used as a basis for reasonable  
25 assurance itself?

**AR 055143**

1 MR. KRAY: Objection, leading.

2 MS. COTTINGHAM: Sustained.

3 Q. (Continuing By Mr. Eglick): You were describing a  
4 two-step process, Mr. Luster?

5 A. Correct.

6 Q. Can you describe the two steps in the process, please,  
7 for reasonable assurance.

8 A. Could I refer to the manual for that as well?

9 Q. Sure.

10 A. Okay. The manual being the 401 desk manual.

11 Q. Which is --

12 MR. REAVIS: 207, I think.

13 A. This two-step process is described on page 36 and 37 of  
14 the manual, and 38. Step 1 is to determine through a  
15 preponderance of evidence the applicable regulations can  
16 and will be met and identify any areas of uncertainty.  
17 Step 2 is to address those areas of uncertainty through  
18 monitoring or contingency plans, that sort of thing.

19 Step 1 should actually be considered step 1-A and 1-  
20 B. If you read on page 37, the last paragraph of step 1  
21 states that "After identifying whether the project can  
22 meet the applicable standards and what measures are  
23 necessary for it to do so, also identify the remaining  
24 uncertainty or doubt about the success of the proposed  
25 project or its mitigation elements."

**AR 055144**

1           So the identification of uncertainty and the  
2           monitoring requirements based on that uncertainty should  
3           only occur after Ecology determines the necessary  
4           specific measures to insure compliance with the  
5           standards.

6           Q. So when you say necessary specific measures to insure  
7           compliance with the standards, are you talking about  
8           reasonable assurance?

9           A. Yes.

10          Q. And let me ask you one other question. Are you familiar  
11          with the term WRIA?

12          A. I am.

13          Q. What is that?

14          A. WRIA is water resource inventory area. The state has  
15          been divided into several dozen WRIAs that consist of one  
16          or more watersheds around the state. A WRIA is  
17          essentially an administrative watershed. It may or may  
18          not be a hydrologic or biological watershed. In the case  
19          of the SeaTac area, Des Moines Creek and Miller Creek  
20          are a part of the same WRIA that includes the Green  
21          River; however, that's merely an administrative  
22          watershed. The biological and hydrologic requirements of  
23          Des Moines Creek and Miller Creek aren't really affected  
24          by those same requirements or characteristics in the  
25          Green River area.

**AR 055145**

1 Q. The Green River area referring to Auburn, for example?

2 A. The off-site mitigation in the Auburn area, yes.

3 Q. In your time at the department, was there a policy  
4 concerning, for example, with the third runway project,  
5 whether wetland mitigation in the WRIA satisfied 401?

6 A. At the beginning of Ecology's review of the proposed  
7 SeaTac project, there was a lot of discussion about in-  
8 basin versus out-of-basin mitigation. Generally, Ecology  
9 clearly prefers in-basin. In some very limited instances  
10 we've gone with out-of-basin mitigation. At about the  
11 midpoint of Ecology's review, I believe, the Legislature  
12 passed RCW 90.74 which allowed for mitigation to occur  
13 within a WRIA, and basically allowing mitigation to occur  
14 outside of the hydrologic or biological watershed. And  
15 so, in this case, that led to Ecology's adopting the  
16 port's proposed out-of-basin mitigation site in Auburn.

17 Q. And was that, was the out-of-site mitigation in Auburn  
18 construed when you were at Ecology as adequate mitigation  
19 by itself?

20 A. No, initially the port had said mitigation could not  
21 occur within basin because of FAA guidelines that frowned  
22 upon areas that would create wildlife hazards near active  
23 airport runways. And after some discussions with the  
24 port, we determined that in-basin mitigation was  
25 appropriate and was allowable. That led to Ecology's

**AR 055146**



1           determination that within the watersheds affected by the  
2           port's project, they would at least have to do one-to-one  
3           mitigation and could do part of the mitigation out of the  
4           basin.

5           Q. I take it you have reviewed the 401 that's at issue here?

6           A. I have.

7           Q. And, in your opinion, does it provide a basis for  
8           reasonable assurance that water quality standards will  
9           not be violated?

10          A. No, it doesn't.

11          Q. Okay. Thank you.

12                        No other questions.

13                        MS. COTTINGHAM: Mr. Poulin, do you have any  
14                        questions?

15                        MR. POULIN: No questions.

16                        MS. COTTINGHAM: I'm not sure between Ecology  
17                        and the port who wants to go first.

18                        MR. REAVIS: I think I'll probably be going  
19                        first.

20

21                                        EXAMINATION

22                        BY MR. REAVIS:

23           Q. Mr. Luster, my name is Gil Reavis and we met at your  
24           deposition for the first time.

25                        You left the Department of Ecology in January of

**AR 055147**

1 2001; is that correct?

2 A. Correct.

3 Q. And before that, your duties were changed a little bit to  
4 where you were no longer responsible for the third runway  
5 project, and that occurred in about October of the year  
6 2000, correct?

7 A. I was no longer directly responsible for the review, yes.

8 Q. You were still sort of the resource for other 401  
9 reviewers at headquarters, but you were not the person  
10 primarily responsible for the third runway?

11 A. Correct.

12 Q. So it's been approximately a year and four or five months  
13 since you have been the person who was directly  
14 responsible for the third runway 401 certification  
15 application?

16 A. That's correct.

17 Q. And in that time, I understand from your testimony that  
18 you have reviewed a number of the documents that are here  
19 in some of these exhibit notebooks today?

20 A. Yes, I have.

21 Q. And I think you said that you talked to Ann Kenny a  
22 couple of times?

23 A. I believe I talked with her three times last May and June  
24 about the proposed project.

25 Q. And those were relatively brief conversations, if I

**AR 055148**

1 recall your earlier testimony?

2 A. Probably ten to 15 minutes or so each.

3 Q. Did you talk to anyone else at Ecology after leaving the  
4 department about the substance of the third runway 401  
5 certification?

6 A. I don't believe so.

7 Q. And I take it that you didn't attend any meetings with  
8 the port or any of the port's experts to discuss the  
9 progress of the project after the time you left the  
10 Department of Ecology?

11 A. That's correct.

12 Q. So other than those calls that you had -- well, let me  
13 back up just a minute. You have talked obviously to  
14 ACC's attorneys, correct?

15 A. I have.

16 Q. So other than the conversations with Miss Kenny and  
17 conversations with ACC's attorneys, primarily what you've  
18 done since you left the Department of Ecology with regard  
19 to this proposal is review documents?

20 A. That's correct.

21 Q. And at the time that your deposition was taken, I think  
22 that you estimated that you had spent about 50 to 100  
23 hours reviewing those documents?

24 A. Yes, I believe that was my recollection.

25 Q. Now, since that time, obviously, while I am sure you have

**AR 055149**

1 done additional work and you had to travel up here and so  
2 forth, but do you think the total amount of time you have  
3 spent on this particular issue since leaving the  
4 Department of Ecology is still within that 50 to 100  
5 range?

6 A. Perhaps a little higher at this point.

7 Q. When you were at the Department of Ecology, I suspect  
8 that you spent a fair bit of time on this project?

9 A. Quite a bit, over four years or so, yes.

10 Q. Do you have any estimate about what percentage of your  
11 time sort of average during that 4-year period you spent  
12 dealing with the third runway application?

13 A. It varied quite a bit. At times it seemed to be about  
14 100 percent of my active work time. Other times, while  
15 we were waiting for port submittals or in the interim  
16 between various key dates, I would do other work. I  
17 would say over the course of four years, perhaps as much  
18 as half my time at work was either working directly on  
19 this proposed project or on issues related to it such as  
20 stormwater issues or the relationship between 401, 402,  
21 that sort of thing.

22 Q. So this project has been through some active phases and  
23 some less active phases, correct --

24 A. Correct.

25 Q. -- during the time that you were at Ecology?

**AR 055150**

1 A. Yes.

2 Q. So during those active phases, sometimes you were working  
3 about 100 percent of your time on it?

4 A. I believe so, yes, for some periods.

5 Q. Now, given the documents that you've seen since you left  
6 the Department of Ecology, does it appear to you that the  
7 last year or so has been a pretty active period with  
8 regard to this particular permit application?

9 MR. EGLICK: Objection, vague.

10 MS. COTTINGHAM: Sustained.

11 Q. (Continuing By Mr. Reavis): Can you compare the amount  
12 of work that you've seen in the last year or so as  
13 reflected in these documents with the active periods that  
14 you yourself experienced and tell me whether that seems  
15 to be a fairly active period?

16 MR. EGLICK: Objection, vague. I can explain  
17 if you would like.

18 MR. REAVIS: I would be happy to hear the  
19 explanation.

20 MR. EGLICK: Well, the request that he explain  
21 the amount of work that he's seen done, he's reviewed  
22 documents, he can say whether progress has been made, I  
23 suppose, but he hasn't seen any work being done, he's  
24 read the documents.

25 MR. REAVIS: I think the question is does that

**AR 055151**

1 appear to be an active period based upon the work product  
2 produced during that time period? That's all the  
3 question asked for.

4 MS. COTTINGHAM: With that clarification, you  
5 can answer the question.

6 A. I would say the during the course of this entire review  
7 over the last four years or so, the last year appears to  
8 be a typical year. The port provided or generated a  
9 number of documents throughout the review as the project  
10 changed or different proposals were advanced and then  
11 withdrawn, all those proposals had quite a few documents  
12 associated with them. And Ecology staff would review  
13 dozens of documents in any given year, so this seems to  
14 be at least typical over the course of the four-year  
15 period.

16 Q. Do you have any idea how much time Ann Kenny has spent  
17 over that time period on this project?

18 A. I don't, no.

19 Q. Now, in addition to whoever the 401 reviewer is, a number  
20 of other people at Ecology typically assist in 401 review  
21 process?

22 A. That's correct.

23 Q. People like Eric Stockdale?

24 A. Yes.

25 Q. Kevin Fitzpatrick?

**AR 055152**

1 A. Correct.

2 Q. And in the course of that last year and four or five  
3 months, this whole facilitated meeting process occurred;  
4 is that your understanding?

5 A. I know it was occurring from about September or October  
6 2000 into earlier that winter, and then I've heard that  
7 another series of meetings occurred after that.

8 Q. Have you seen the minutes of those meetings?

9 A. I know I've seen the minutes of the meetings in 2000. I  
10 believe I also saw some of the minutes for the later  
11 meetings, yes.

12 Q. And that facilitated process started while you were still  
13 the primary 401 reviewer for the port's application?

14 A. Correct.

15 Q. And the purpose for that series of meetings was to create  
16 a comprehensive list of all of the outstanding issues  
17 with regard to the port's application?

18 A. It was to identify issues that needed to be resolved at  
19 that stage in the review process, yes.

20 Q. And in October of 2000, I think we discussed a document  
21 here a minute ago, where you were providing comments on  
22 some of the draft meeting minutes of that facilitated  
23 process, correct?

24 A. That's correct.

25 Q. So you at the time in October, shortly before your duties

**AR 055153**

1           were changed, you were attempting to give your input to  
2           that facilitated meeting process for the purpose of  
3           identifying all of those outstanding issues?

4           A.   Yes, I was.

5           Q.   Let me ask you a few questions about a topic that  
6           Mr. Eglick raised and that is section 401(D) of the Clean  
7           Water Act.  I believe you refer to that in your prefiled  
8           testimony as well.  Now, it's your interpretation of that  
9           statute, is it not, that it requires effluent limitations  
10          and monitoring as mandatory in a 401 certification?

11          A.   I believe 401(D) says that any certification issued shall  
12          include those two options, yes.

13          Q.   Would you agree with me that that's a legal conclusion as  
14          to whether or not the statute is mandatory?

15          A.   I don't know what's meant by a legal conclusion.

16          Q.   Do you know whether or not there are cases that actually  
17          discuss whether that provision is mandatory?

18          A.   I'm not aware of decisions or cases that reference that;  
19          it's just the plain language of 401(D).

20          Q.   But you're not an attorney?

21          A.   Correct.

22          Q.   Would you agree with me that at least it's the board's  
23          province in this case to decide whether 401(D) makes  
24          effluent limits mandatory?

25          A.   I would clearly agree that the board has the ability to

**AR 055154**



1 weigh in on that. I would say it's Ecology's obligation  
2 to implement that regulation as the plain reading of the  
3 statute requires as well.

4 Q. But presumably the board can read the statute and  
5 understand it?

6 A. Correct.

7 Q. During the course of your work on 401s for Ecology, did  
8 you ever issue a 401 certification with numeric effluent  
9 limits for storm water?

10 A. As I stated earlier, when we had this issue come up  
11 several years ago, we had been depending on an  
12 applicant's compliance with the stormwater manual that  
13 Ecology had with the understanding that that manual  
14 insured compliance with the standards, including numeric  
15 criteria. We found out, I believe, it was late '90s or  
16 so, at the beginning of that, the 401 and 402  
17 negotiations that I referred to earlier, that compliance  
18 with the manual did not insure compliance with criteria.  
19 And so at that point we started the negotiations with the  
20 water quality program to resolve this issue.

21 I believe, to go back to your question, I believe  
22 there may have been a couple of 401s where we were -- it  
23 was a brand-new facility being proposed. We anticipated  
24 that an NPDES permit would be required in the future as  
25 the project was constructed and started operations. And

**AR 055155**

1 the 401 may have included specific criteria. The one  
2 example I'm thinking of that that might apply to is the  
3 Emerald Downs race track in southern King County. I  
4 recall doing a more extensive review of the stormwater  
5 requirements for that facility. I know there were more  
6 specific performance measures. They may have taken the  
7 form of numeric criteria, but I can't recall  
8 specifically.

9 Q. So you don't recall whether or not that one actually had  
10 numeric criteria in it?

11 A. Not offhand, no.

12 Q. And you don't recall any other 401 certifications issued  
13 while you were at the Department of Ecology that had  
14 numeric limits for storm water?

15 A. Not that I recall right now.

16 Q. Now, in terms of just the terminology, effluent  
17 limitations are not necessarily equated with numeric  
18 limitations, correct?

19 A. There are several forms of effluent limitations, yes.

20 Q. And what are those forms?

21 A. There are the numeric and narrative criteria; various  
22 practices that an applicant can do to insure that the  
23 criteria are met.

24 Q. So would you consider BMPs then to be effluent limits?

25 A. They are effluent limits if they result in the criteria

**AR 055156**

1 being met, yes.

2 Q. Now, typically, numeric limits are applied to steady-  
3 state discharges rather than storm water; is that  
4 correct?

5 A. I know numeric criteria are applied to a number of  
6 steady-state discharges. I am also aware that they are  
7 to be required in some instances with storm water.

8 Q. Okay. But the norm, I guess, what it sounds like, is  
9 that you're describing sort of recent trend toward  
10 perhaps requiring some numeric limits for storm water,  
11 but the norm for numeric limits has typically been for  
12 steady-state discharges?

13 MR. EGLICK: Objection to the form of the  
14 question, characterizing the testimony, I think it's a  
15 little bit argumentative.

16 MS. COTTINGHAM: Overruled.

17 A. Could you repeat the question.

18 Q. What I was trying to get at is it sounds like what you're  
19 describing is a trend toward perhaps requiring numeric  
20 limits with regard to storm water that's just now  
21 occurring, but, typically, numeric limits are applied to  
22 steady state discharges as opposed to storm water?

23 A. Well, effluent limits are applied to steady state,  
24 they're also applied to -- I know a number of industrial  
25 facilities that have discharges with effluent, specific

**AR 055157**

1 numeric criteria attached, are not steady state  
2 discharges. Their flow and contaminant concentrations  
3 change dramatically over the course of a day or a week or  
4 a year. So those aren't steady state, but they do have  
5 numeric criteria attached.

6 I'm also aware of at least one court decision where  
7 the 9th District Court, I believe, ruled in a case in  
8 Arizona that any discharges, including storm water,  
9 associated with an industrial NPDES permit, were to have  
10 numeric criteria attached and differentiated that between  
11 an industrial facility and a municipal NPDES permit not  
12 requiring numeric effluent for storm water.

13 Q. And which case is that?

14 A. Defenders of Wildlife versus Browner out of Arizona.

15 Q. And presumably the board can also read that case and  
16 determine whether they agree with your interpretation?

17 A. Correct.

18 Q. Some of the numeric criteria or the water quality  
19 standards and in WAC 173-201A-040 require one-hour  
20 average concentration in order to determine whether  
21 there's compliance with the criteria, correct?

22 A. Acute criteria is based on that one-hour concentration,  
23 yes.

24 Q. And chronic criteria sometimes are based on a four-day  
25 average; is that right?

**AR 055158**

1 A. That's correct.

2 Q. So with regard to storm water, isn't it true that some  
3 storms don't last an hour or even, more dramatically,  
4 four days?

5 A. That's correct.

6 Q. You discussed earlier these discussions that were going  
7 on between the 401 program and the 402 program. Do you  
8 recall that?

9 A. I do.

10 Q. 402 being the NPDES program?

11 A. That's correct.

12 Q. And as I recall from your earlier testimony, there was a  
13 policy developed that sort of tried to codify the  
14 resolution of all those discussions that the two programs  
15 were having; is that correct?

16 A. Yes, it is.

17 Q. And I think that that is Exhibit Number 221.

18 MR. KRAY: Would it help to move that exhibit  
19 away from you.

20 THE WITNESS: No, I'm fine, thanks. I'll try  
21 not to knock it down.

22 Q. (Continuing By Mr. Reavis): Do you have that exhibit in  
23 front of you?

24 A. I do.

25 Q. And as I understand this document -- well, first, let me

**AR 055159**

1 ask you, does that appear to be attached to the first  
2 page, which is an email, does that appear to be the  
3 policy that you were referring to?

4 A. I believe it is. I know there's been testimony provided  
5 by Ecology that refers to the policy. Its effective date  
6 was July 2001, and this exhibit says effective March 31st  
7 of 2000. My understanding is that the final policy did  
8 not differ substantially from this one.

9 Q. So you believe this does represent, to the best of your  
10 understanding, Ecology's current policy on 401, 402  
11 issues?

12 A. Between the water quality program and the shorelands  
13 program, yes.

14 Q. Let me ask you, then, to refer to page 2 of 4 there on  
15 that exhibit under subsection B. Do you see that?

16 A. I do.

17 Q. And let me just skip to sub 1 there and ask you a couple  
18 of questions about that. The first clause or first three  
19 or four lines there say, "When a project's discharges are  
20 covered by an individual 402 permit and the project is in  
21 compliance with that permit, as determined by the water  
22 quality program, the 401 certification will require  
23 compliance with the individual 402 permit as adequate for  
24 compliance with the water quality standards."

25 And that's the first portion of that section; is

**AR 055160**

1           that correct?

2           A. That's correct.

3           Q. And then reading on in that sentence, it says, "However,  
4           additional 401 certification conditions may be necessary  
5           to address compliance for storm water and other water  
6           quality impacts or project areas not covered by the 402  
7           permit." Did I read that correctly?

8           A. You did.

9           Q. So as I understand it then, normally storm water will be  
10          governed by 402, but if there's a 401 involved, the 401  
11          can add additional conditions; is that your understanding  
12          of what the policy is?

13          A. Yes, that is.

14          Q. Typically, 402 permits don't regulate low-flow impacts,  
15          do they?

16          A. I'm not sure what you mean by low flow. I know a lot of  
17          402 permits include flow moderation for stormwater  
18          detention or retention ponds and release rates into  
19          receiving waters.

20          Q. Okay. Let me ask you I guess more specifically with  
21          regard to a proposal like the port's, where the proposal  
22          is to detain storm water and release it in order to  
23          augment stream flow in the summertime, that's not a  
24          typical provision under an NPDES permit, is it?

25          A. No, it's not. I don't think that's typical under any of

1 the permits that I'm familiar with.

2 Q. So that's an additional requirement that is not normally  
3 covered by a 402 permit that's in this 401?

4 A. To my understanding, yes.

5 Q. How typical is it, to your understanding, to have a  
6 requirement in an NPDES permit that the applicant go  
7 beyond impacts of the project and retrofit existing  
8 facilities?

9 A. I'm not certain if that's common or not.

10 Q. Would you consider that to be an additional condition  
11 that this 401 is requiring?

12 A. Yes, it's a condition of the 401.

13 Q. So then relative to this guidance document or this  
14 policy, this particular 401 we're here about today has  
15 gone beyond the 402 permit in a couple of different areas  
16 at least?

17 A. Yes, in a couple areas.

18 Q. While you were at the Department of Ecology, in the  
19 course of your work on these 700-some-odd 401s, you  
20 relied on a number of technical experts, did you not?

21 A. I did.

22 Q. And with regard to purely technical issues, would you  
23 typically rely on their judgment as to a technical issue?

24 A. Generally. I'm not quite sure what you mean by purely  
25 technical issue.

**AR 055162**



1 Q. Well, I mean, you're not - and this laundry list has come  
2 out in other testimony - you're not a geologist, are you?

3 A. No, I am not.

4 Q. You are not a hydrogeologist?

5 A. Correct.

6 Q. You're not a seismologist?

7 A. No.

8 Q. Wildlife biologist?

9 A. I'm not.

10 Q. Fisheries biologist?

11 A. No.

12 Q. Toxicologist?

13 A. No.

14 Q. A chemist?

15 A. No.

16 Q. Or an engineer?

17 A. I'm not.

18 Q. So isn't it necessary in the course of your work for you  
19 to rely on people who do have those types of  
20 qualifications?

21 A. Definitely, yes.

22 Q. I believe that your resume' lists that you are a member  
23 of the Society of Wetland Scientists?

24 A. That's correct.

25 Q. That society has a number of different types of

**AR 055163**

1 memberships, correct?

2 A. That's right.

3 Q. One of those types is a professional certification where  
4 you submit your qualifications and they certify you as a  
5 certified professional wetland scientist; is that  
6 correct?

7 A. That's not a category of membership, it's something  
8 separate, but it is a service offered by the society for  
9 some of its members, yes.

10 Q. But there is a certification program offered by that  
11 society?

12 A. Yes, there is.

13 Q. And you're not certified by the society?

14 A. No, I'm not.

15 Q. The type of membership that you have is one that any  
16 member of the public can have?

17 A. That's correct.

18 Q. So the fact that you are a member of that society in and  
19 of itself doesn't mean you have a particular expertise in  
20 wetland science?

21 A. No, not necessarily.

22 Q. Let me ask a few questions about the regionalization of  
23 the 401 function. That whole process at Ecology started  
24 sometime in 1997 or '98; is that correct?

25 A. I'm not sure of the exact date. That sounds about right,

**AR 055164**

1           though.

2           Q.   And the intent of that was to transfer numerous  
3           functions, not just 401 functions, but numerous functions  
4           in other programs from headquarters out to the regions?

5           A.   That's correct, Ecology was generally moving a lot of  
6           functions to the regional offices.

7           Q.   And what were the reasons for that regionalization, as  
8           you understood it?

9           A.   My understanding was the primary reason was to get  
10          reviewers and project-related staff closer to the actual  
11          projects being proposed around the state, rather than  
12          have those functions come solely from here in Lacey. It  
13          was intended to allow staff to be -- for them to travel  
14          more easily to do site visits or meet with applicants or  
15          interested public, that sort of thing.

16          Q.   So, in other words, they were closer to the community  
17          they were regulating by being in the region?

18          A.   That's correct.

19          Q.   And SeaTac Airport is in the Northwest Region for  
20          Ecology?

21          A.   Correct.

22          Q.   And the office is located in Bellevue?

23          A.   That's right.

24          Q.   Now, I thought when we took your deposition, you told me  
25          that some --

**AR 055165**

1 MR. POULIN: Your Honor, I would like to  
2 object to use of deposition for non-impeachment purposes  
3 prior to any ruling on the use of depositions.

4 MR. EGLICK: Well, his deposition is attached  
5 to his prefiled, so --

6 MS. COTTINGHAM: I'm going to overrule the  
7 objection.

8 MR. EGLICK: Sorry. Just wanted to be fair.  
9 Would the board mind if I approached Mr. Luster and  
10 refilled his water?

11 MS. COTTINGHAM: Do you need more water?

12 THE WITNESS: Sure. Thank you.

13 Q. (Continuing By Mr. Reavis): I thought when we took your  
14 deposition, you told me some of the projects that you had  
15 at the time that the functions were being regionalized,  
16 some of your 401 projects were being transferred to the  
17 regions.

18 A. I believe that if a project or an application had just  
19 come in and I or the other headquarters staff had not  
20 done much substantive review and we had a trained 401  
21 staff in the region, we may have moved some small number  
22 of projects to that person for review.

23 Q. So it depended in part on whether there was a reviewer in  
24 the region who could handle 401s?

25 A. That's correct.

**AR 055166**

1 Q. Ann Kenny was hired sometime in that time frame to be the  
2 401 reviewer for the Northwest Region, correct?

3 A. That's right.

4 Q. And part of your duties was to train Ann Kenny?

5 A. Yes.

6 Q. And as I understand the date for the transition, the  
7 third runway project was transferred from you to Ms.  
8 Kenny in about October of 2000?

9 A. That's correct.

10 Q. And about a month before that transfer occurred, the port  
11 had actually withdrawn its 401 application?

12 A. I believe that was four to six weeks or so before that  
13 transfer, yes.

14 Q. So if the project was going to move forward after that  
15 application was withdrawn, a new application would have  
16 to be filed?

17 A. That's correct.

18 Q. So at the time that your transfer occurred, there wasn't  
19 an application pending for that 401, was there?

20 A. That's correct.

21 Q. And isn't that a good opportunity to do a transition if  
22 the intent is to transfer the third runway project?

23 A. Very well may be. The main question is would it be wise  
24 to transfer such a complex project with such a long  
25 history behind it and with the need to have some sense of

**AR 055167**

1 continual knowledge and expertise on the project, but if  
2 you are going to make the transition, I suppose doing it  
3 when a new application came in would be as good a time as  
4 any.

5 Q. Let me switch gears a little bit now and ask you some  
6 questions about fill criteria. When you were working at  
7 Ecology reviewing 401s, were you ever aware of any 401  
8 certification containing numeric criteria for fill  
9 besides the 401 the port actually got?

10 A. We had several earlier in my career at Ecology that dealt  
11 with contaminated sediments, and we established certain  
12 criteria for allowing those sediments to be disposed of  
13 either in upland locations or underwater locations, or if  
14 they exceeded certain numeric criteria, they would have  
15 to be dealt with as some form of hazardous or toxic  
16 waste. So there were a number of examples like that.

17 Q. But in those instances there were sediment criteria that  
18 you could refer to in order to create the 401; is that  
19 correct?

20 A. Yes, the sediment criteria are a part of the state water  
21 quality standards, yes.

22 Q. Okay. What I understood, though, was that you didn't  
23 have any of that sort of guidance with regard to the  
24 criteria for fill, the soil, when you first started  
25 working on the port's 401 application.

**AR 055168**

1 A. We had general guidance from the Corps of Engineers,  
2 which stated fill shall not include toxic materials in  
3 toxic amounts. And so I know we have used that narrative  
4 criteria in previous 401 projects. I don't recall  
5 offhand if there were 401s that included numeric fill  
6 criteria based on that general prohibition.

7 Q. So, to the best of your recollection today, you don't  
8 recall that?

9 A. I don't recall.

10 Q. And when you were working on the port's 401  
11 certification, there were some discussions going on  
12 between the port and Ecology in order to develop numeric  
13 fill criteria; is that correct?

14 A. That's correct.

15 Q. Were you participating in those discussions?

16 A. Yes, in a number of them.

17 Q. And there was a prior 401 issued to the port in July of  
18 1998; is that right?

19 A. That's correct.

20 Q. Now, during the course of those discussions over fill  
21 criteria, wasn't there an agreement worked out between  
22 the port and Ecology establishing numeric criteria for  
23 fill, prior to this particular 401, back in '98, '99?

24 A. Again, I'm not certain of the timing, but there was an  
25 agreement that allowed for the use of certain types of

**AR 055169**

1 fill to be brought in and stockpiled at the airport, yes.

2 Q. Now, that July 1998 401 certification was one that you  
3 wrote, correct?

4 A. Correct.

5 Q. And I believe it's referred to in your prefiled  
6 testimony.

7 A. I believe I discussed it, yes.

8 Q. And doesn't that July 1998 401 certification incorporate  
9 this agreement between Ecology and the port establishing  
10 numeric criteria?

11 A. I'd have to look at the certification again, but I  
12 believe that is a condition.

13 Q. You might look at Exhibit 211. I don't know if you have  
14 that one there in front of you.

15 A. I do.

16 Q. And if you look over on page 15 of 19, and I'm referring  
17 to paragraph E7b, it looks like the third paragraph of  
18 that section. Do you see that paragraph?

19 A. I do.

20 Q. And, by the way, I think this exhibit has been  
21 stipulated.

22 That paragraph says, "The port shall also provide  
23 copies of the quarterly updates described in the final  
24 third runway soil fill quality criteria, listing the  
25 sources, quantities and placement of fill on port

**AR 055170**



1 property."

2 Is it your recollection that that final soil fill  
3 quality criteria document is the agreement worked out  
4 between the port and Ecology establishing numeric limits  
5 for fill?

6 A. I believe it is, yes.

7 Q. And, to the best of your recollection, that's the first  
8 time the Department of Ecology had ever established those  
9 types of numeric criteria for fill?

10 A. Yes, that I can recall, other than the sediment ones that  
11 I have mentioned.

12 Q. Now, the fact that there is a particular constituent or  
13 metal or something in soil doesn't necessarily mean that  
14 it's going to leach out and affect water quality; is that  
15 something that you know?

16 A. That's my understanding. It depends on the  
17 characteristics of the soil and the type of metal and  
18 groundwater that may be flowing through.

19 Q. And you're familiar, are you not, with the fact that  
20 there are certain methodologies out there to determine  
21 how much of a constituent can exist in soil without  
22 harming the water quality?

23 A. I'm aware that there are various methods, yes.

24 Q. And one of those is set forth in the MTCA regulations; is  
25 that something that you are familiar with?

**AR 055171**

1 A. I have a general familiarity with MTCA, yes.

2 Q. Have you ever done any of that sort of analysis yourself

3 to do the calculations to determine what water quality

4 impacts might result from fill?

5 A. No, I haven't done those calculations myself.

6 Q. Is that within your technical expertise to do those

7 calculations?

8 A. No.

9 Q. Let me ask you about some of the testimony that you gave

10 just a few minutes ago dealing with class AA streams. Do

11 you remember that testimony?

12 A. I do.

13 Q. And these streams, Miller, Des Moines and Walker, are

14 class AA?

15 A. That's correct.

16 Q. Do you know whether the fact that a stream flows to Puget

17 Sound automatically makes it a class AA stream?

18 A. I believe that's essentially the default unless a stream

19 has been assigned another classification, or flows into

20 an area of Puget Sound that is not classified AA, then

21 the stream would be considered AA.

22 Q. The fact that a stream is AA doesn't mean that it's

23 currently supporting all beneficial uses?

24 A. That's correct. The intent is that Ecology decisions be

25 made to allow that stream to support those uses.

**AR 055172**

1 Q. But isn't it true that a number of class AA streams are  
2 degraded?

3 A. That's correct.

4 Q. And so they're not currently supporting all beneficial  
5 uses?

6 A. That's right.

7 Q. And isn't that true of the streams that we are talking  
8 about here, particularly Des Moines Creek?

9 A. Yes, it is.

10 Q. Now, Des Moines Creek in particular drains a fairly  
11 extensive urban area; isn't that right?

12 A. That's right.

13 Q. Including Highway 99 or the Pacific Highway South?

14 A. Portions of it, yes.

15 Q. And isn't it true that runoff from urban roadways like  
16 Pacific Highway South often contain certain pollutants?

17 A. That's correct.

18 Q. Lead being one?

19 A. Lead, yes.

20 Q. Copper being another?

21 A. Correct.

22 Q. Isn't it true that the port's stormwater runoff on  
23 average is cleaner than average urban surface water?

24 A. I'm not aware that that's the case. I know that the port  
25 has compared its runoff with several selected sites

**AR 055173**

1 elsewhere in the region, but I don't know what the  
2 average concentration of contaminants is in urban runoff.

3 Q. Do you know whether there's a document the port prepared  
4 making that comparison?

5 A. I believe I've seen that comparison in several different  
6 documents.

7 Q. You just don't remember what the results showed; is that  
8 what you're saying?

9 A. I recall the port's statement that its runoff is  
10 generally cleaner than several selected sites in the  
11 region, yes.

12 Q. But you don't know from your own research whether that's  
13 an accurate statement or not?

14 A. Yes, I haven't researched it further.

15 Q. Now, is it your view -- and I had a little hard time  
16 understanding some of your direct testimony on this point  
17 -- but is it your view --

18 MR. EGLICK: Objection as to form.

19 MS. COTTINGHAM: Sustained.

20 Q. (Continuing By Mr. Reavis): Is it your view that if a  
21 project applicant needs a 401, that the 401 should be  
22 denied until all beneficial uses have been restored in  
23 the affected water body?

24 A. It's my view that in order for Ecology to insure that  
25 water quality standards are met in a given water body, it

**AR 055174**

1 must insure that both the water body is meeting water  
2 quality standards and discharges to that water body are  
3 meeting water quality standards. If an applicant comes  
4 in with mitigation proposals that allow those standards  
5 to be met, that clearly is something Ecology can approve.

6 Q. Let me ask you a couple of questions about the scope of  
7 401. As I understand your testimony, the need for a 404  
8 serves as a threshold for the issuance of a 401, but the  
9 401 can go beyond the scope of the 404 pursuant to these  
10 legal authorities that you discussed?

11 A. That's correct. In many cases, the 401 has gone beyond  
12 just what the trigger for the need for a 404 is.

13 Q. But just because Ecology has the jurisdiction and the  
14 authority to go beyond the 401 to all kinds of other  
15 parts of the project, it's not required for Ecology to  
16 regulate everything, is it, even things that have no  
17 impacts to water quality?

18 MR. EGLICK: Objection as to the form of the  
19 question. It got a little bit convoluted, compound and  
20 vague.

21 MS. COTTINGHAM: Why don't you restate your  
22 question.

23 Q. (Continuing By Mr. Reavis): Given that the 401 process  
24 does have an expansive scope, if I can describe it that  
25 way, it's not necessary for Ecology to regulate

**AR 055175**

1 everything within that scope, is it?

2 A. Ecology's review and decision is supposed to result in a  
3 finding that the state aquatic protection regulations  
4 will be met, and so, clearly, any aspects of a proposal  
5 or a facility that affect water quality standards are  
6 within Ecology's purview. If Ecology were to leave out  
7 something that may affect water quality standards, I  
8 would say that, generally, that would fall short of the  
9 requirement of section 401.

10 Q. But the test really is, is a particular portion of the  
11 project going to have any impact on water quality.

12 MR. EGLICK: Objection as to the form of the  
13 question. Vague. I'm not clear what the test is that's  
14 -- the test for what?

15 MS. COTTINGHAM: Clarify.

16 Q. (Continuing By Mr. Reavis): I guess the test for  
17 determining which particular parts of a project should be  
18 regulated is whether or not those projects can have any  
19 direct or indirect impacts on water quality.

20 MR. EGLICK: Well, objection. May I -- is the  
21 question referring to the parts of the project or is it  
22 referring at the end to the whole project? I think the  
23 word project is being used in a larger sense and smaller  
24 sense and that's what's making the question, I think,  
25 vague.

**AR 055176**

1 Q. (Continuing By Mr. Reavis): Well, let me just ask you,  
2 if something is within the scope of Ecology's  
3 jurisdiction to review in connection with a 401, but it  
4 has no possible impacts on water quality, direct or  
5 indirect, it's not necessary for Ecology to regulate that  
6 particular aspect of the project?

7 A. Well, it's still kind of hard for me to answer that. 401  
8 is a very case-by-case and project-specific review, and  
9 Ecology, in some cases, won't focus on a particular  
10 aspect of a facility if there's no connection with  
11 compliance with water quality standards. It depends on  
12 how integrated one part of the facility is with another,  
13 if there's connections, say, between existing and  
14 proposed areas and stormwater discharges from both of  
15 those areas; is a proposed part of a facility dependent  
16 on other parts of the facility or can it exist  
17 independently. All those enter into determining the  
18 scope of a review.

19 Q. And I guess my question then is, is it up to the Ecology  
20 person who is doing the review to determine whether or  
21 not those particular parts of a project could have some  
22 relationship to water quality?

23 A. Yes, if that determination is based on the regulatory  
24 requirements in the various guidance and previous  
25 decisions that have been made, yes.

**AR 055177**

1 Q. Obviously, they have to do their job correctly?

2 A. Correct.

3 Q. Now, as I understood your testimony, then, about step 1  
4 and step 2 of reasonable assurance, step 1-A, as I heard  
5 you describe, was to determine that there is reasonable  
6 assurance that water quality standards will be met,  
7 correct?

8 A. That's part of step 1.

9 Q. 1-B, which I think you clarified, was to identify  
10 remaining uncertainty?

11 A. Correct.

12 Q. And then step 2 is to deal with that uncertainty by  
13 conditions in the 401?

14 A. Well, you also condition the 401 based on the findings of  
15 the step 1. You require the specific measures that are  
16 needed to insure water quality standards are met and the  
17 conditions can then also require monitoring or  
18 contingency plans as needed to reduce that uncertainty.

19 Q. So then even in reaching step number 1, which is the  
20 decision about reasonable assurance, you can place  
21 conditions in the 401 to make sure that you have  
22 reasonable assurance?

23 A. Yes, that's definitely correct.

24 Q. But there still can be some uncertainty after you have  
25 already made that decision on reasonable assurance,

**AR 055178**



1 correct?

2 A. Some small amount of uncertainty, yes.

3 Q. And that's why you place additional conditions in to deal  
4 with?

5 A. Correct.

6 Q. And during the course of issuing 401s for Ecology, you've  
7 placed conditions in a number of 401s, I assume?

8 A. That's correct.

9 Q. Do you have any idea how many of the 700 had additional  
10 conditions in them?

11 A. I believe pretty much every 401 has had conditions.

12 Q. Thank you. That's all I have for now.

13 MS. COTTINGHAM: Let me ask a question of the  
14 parties before we move on to Ecology's cross examination.  
15 Are you going to have a lot of questions? You think we  
16 can finish it up now or do you want to take an early  
17 lunch break?

18 MR. KRAY: I can't speak for Mr. Eglick,  
19 though.

20 MS. COTTINGHAM: I meant just on the cross.

21 MR. KRAY: Sure.

22

23 EXAMINATION

24 BY MR. KRAY:

25 Q. Mr. Luster, on page 12 of your prefiled testimony, you

**AR 055179**

1           commented on what you allege was wide-spread arsenic  
2           contamination in soils in Pierce and King County. Do you  
3           have any reason to believe that what you categorized as  
4           wide-spread arsenic contamination was caused by the Port  
5           of Seattle?

6           A. No, I have no reason to believe that they caused that,  
7           no.

8           Q. Mr. Luster, my apology, I should introduce myself. I am  
9           Jeff Kray, representing the Department of Ecology.

10                   Do you have any reason to believe you presently have  
11           authority to speak on behalf of the Washington Department  
12           of Ecology?

13           A. In my current position, no.

14                   MR. KRAY: No further questions.

15                   MS. COTTINGHAM: Mr. Eglick, do you have any  
16           redirect?

17                   MR. EGLICK: I do.

18                   MS. COTTINGHAM: Is it going to take awhile?

19                   MR. EGLICK: It could. If the board would  
20           rather do an early lunch, that might be better. Is that  
21           the board's preference?

22                   MS. COTTINGHAM: We haven't taken a break up  
23           here.

24                   MR. EGLICK: That would be fine and then we  
25           can come back.

**AR 055180**

1 MS. COTTINGHAM: Why don't we come back at 1  
2 o'clock and finish up the redirect and board questioning.

3 (Whereupon, a recess was taken.)

4 MS. COTTINGHAM: Back on the record. And we  
5 will deal with two motions that we have outstanding.

6 On the appellant's motion in limine to exclude late-  
7 produced plans and reports, the board denies ACC's motion  
8 in limine. This ruling is based on the board's  
9 prehearing order which set tight time lines for the  
10 production of plans and reports, quote, prepared or  
11 expected to be prepared pursuant to the 401  
12 certification, end quote. The operative intent of the  
13 prehearing order, and as evidenced by the transcript of  
14 the hearing, was to prevent late presentation of those  
15 formal aspects of the 401 certification. None of the 17  
16 items identified by ACC were prepared pursuant to the  
17 401. So, therefore, the motion is denied.

18 The next motion I'd like to deal with is the  
19 appellant's motion to publish the depositions of Ecology  
20 managers and CR 30(b)(6) designated witnesses.

21 The board's ruling is that no deposition will be  
22 admitted carte blanche. The publication of depositions  
23 requested under rule 32(a)(2) will be conditionally  
24 granted for general use. This applies to the depositions  
25 of Tom Fitzsimmons, Gordon White, and Ray Hellwig.

**AR 055181**

1           Admission will be subject to some conditions which I  
2 will describe later. And the publication of depositions  
3 requested under rule 30(b)(6) will be conditionally  
4 granted, but for only those matters specifically  
5 designated, their subject matter that they were  
6 specifically designated to testify for.

7           This applies to the depositions of Ann Kenny, Eric  
8 Stockdale, John Drabek, Kevin Fitzpatrick and Peter Kmet.  
9 The admission of these depositions will also be subject  
10 to the same conditions which I'll describe.

11           Should any of the parties later in the hearing  
12 request the publication of other depositions, any of  
13 those must also meet the same conditions that I'm going  
14 to set forth.

15           Here are the conditions: One, on admissibility, an  
16 introductory statement must be attached to each  
17 deposition, and the deposition itself shall be excerpted,  
18 and the summary shall indicate what purpose it will be  
19 used for or what it will be offered to prove. If the  
20 witness is a 30(b)(6) witness, the specific designation  
21 must be clearly stated. The statement must also show the  
22 basis for admissibility if admissibility is challenged  
23 via an objection.

24           As I mentioned earlier, another condition is that  
25 the relevant portions shall be excerpted. The deposition

**AR 055182**

1 must be edited in some manner, either by highlighting or  
2 by page selection, to offer only that portion of the  
3 deposition that will be relied on. For 30(b)(6)  
4 witnesses, excerpts shall relate only to the specific  
5 designation. If a highlighted or excerpted portion of a  
6 deposition does not meet these conditions, it will not be  
7 admitted.

8 The next condition relates to counter provisions.  
9 The offering party must comply with CR 32(a)(4) in that  
10 the opposing party may require another section of the  
11 deposition to be included in order to achieve fairness in  
12 presentation. Both sections must be presented  
13 simultaneously.

14 And, finally, objections, the final condition.  
15 Objections that require the exclusion of the evidence, if  
16 the witness were present testifying, must be attached to  
17 the introductory statement to facilitate a ruling by the  
18 board.

19 And with that, the board conditionally grants the  
20 motion for publication of depositions.

21 MR. STOCK: For purposes of clarification,  
22 Miss Cottingham, once ACC designates the portions of the  
23 deposition that it wants to submit to the board and we  
24 give those designations to the port and Ecology, how much  
25 time will the opposing party have to designate so that we

**AR 055183**

1 can get the deposition as designated to the board as soon  
2 as possible?

3 MS. COTTINGHAM: How much time will Ecology or  
4 the port need in that case?

5 MR. KRAY: I would ask for at least a couple  
6 of days. We haven't had a chance to see -- let me back  
7 up. I would say it depends on the length of the -- I  
8 think we have to see the purpose for which it's being  
9 used, the length of excerpts, that type of thing, before  
10 I can answer that question fully, but I think given the  
11 situation, I would ask that at least a full day between  
12 the time provided to us to the time that we have an  
13 obligation to respond.

14 MS. COTTINGHAM: Here is the time period. If  
15 you offer it during a day, any time during a day, the  
16 next full day will be allowed for them and they will then  
17 submit it the first thing in the morning, so that would  
18 be -- there will be a full day. So there's offering day,  
19 the review day, the introductory day.

20 MR. STOCK: First thing in the morning?

21 MS. COTTINGHAM: First thing in the morning.  
22 Is that enough time for you?

23 MR. KRAY: I can't say for certain, but I will  
24 accept the condition and if we have a problem with it, I  
25 will let you know.

**AR 055184**

1 MR. STOCK: And at that point that they submit  
2 that, any objections are submitted at the same time?

3 MS. COTTINGHAM: I need you to bundle them all  
4 together so that they come in as a bundle to the board.  
5 And, again, I would like an original and three copies of  
6 each packet.

7 MR. KRAY: Would it be possible for the board  
8 to put this particular, given the number of conditions in  
9 it, in writing so that we all have it available?

10 MS. COTTINGHAM: Yes.

11 MR. POULIN: And, for your convenience, Your  
12 Honor, would you prefer the full-size paging or the  
13 minuscrit version?

14 MS. COTTINGHAM: When you held up your  
15 notebook over there, how many pages were on each page?

16 MR. STOCK: There are four pages. Would you  
17 like to see it?

18 MS. COTTINGHAM: No. Is it of a font size  
19 that anybody over the age of 40 can read?

20 MR. STOCK: Well, I need these to read it,  
21 so --

22 MR. PEARCE: You definitely need your readers.  
23 You might want full-size pages.

24 MS. COTTINGHAM: I would like you to use your  
25 judgment.

**AR 055185**

1 MR. STOCK: The four pages is convenient, it  
2 makes for faster reading.

3 MR. KRAY: That would be my preference as  
4 well. It can get tiring reading long amounts.

5 MS. COTTINGHAM: Any other question?

6 MR. KRAY: No.

7 MS. COTTINGHAM: Well, I'll put this in  
8 writing and try and get it out this afternoon, and if I  
9 don't get it done before we conclude today, I'll  
10 distribute it first thing in the morning.

11 MR. STOCK: We have got enough to get started.

12 MS. COTTINGHAM: And with that, we will go off  
13 the record and I'll go check and see if we have all of  
14 our board members back.

15 (Whereupon, a recess was taken.)

16 MS. COTTINGHAM: We'll go back on the record.  
17 And, Mr. Luster, you're still under oath and we're going  
18 back to -- we're going to start on cross examination.

19 MR. EGLICK: Yes.

20

21 EXAMINATION

22 BY MR. EGLICK:

23 Q. Mr. Luster, before the lunch break, you were talking with  
24 Mr. Reavis and one of the questions he asked you had to  
25 do with - or line of questions, rather - scope of a

**AR 055186**



1 project under 401 review and how you determine it.

2 I wanted to ask you a follow-up question on that  
3 topic. In your experience, in Ecology 401  
4 certifications, was the scope of a project to which a 401  
5 certification applied determined before or after a 401  
6 certification was issued?

7 MR. KRAY: Objection, leading.

8 MS. COTTINGHAM: Would you restate your  
9 question. I will sustain that.

10 Q. (Continuing By Mr. Eglick): When does one determine, if  
11 one ever does, the scope of a 401 certification project?

12 MR. KRAY: Objection, argumentative.

13 MS. COTTINGHAM: I am going to overrule that  
14 one.

15 A. The scope of the project is actually determined during  
16 the review of the project rather than at the time of the  
17 decision so that Ecology knows what all to include in its  
18 review. This is particularly important because of the  
19 role of the 401 as a regulatory tool. The 401 is  
20 primarily an opportunity for the state to tell the  
21 federal agency its final decision on a proposed project  
22 and whether or not this proposal meets the state's  
23 aquatic regulation requirements. And so if the review is  
24 determined after the 401 is issued, the state would,  
25 therefore, would not be providing to the Corps of

**AR 055187**

1 Engineers its full review and determination on the full  
2 project. That's just the nature of 401 and its one-time  
3 opportunity for the state to weigh in on such a proposal.  
4 Q. Well, in your work for Ecology on these 700 401s that you  
5 mentioned, do you recall ever issuing a 401 where you  
6 could not describe at the time it was issued what the  
7 scope of the project was that it applied to?  
8 A. I can't recall any like that, no.  
9 Q. Okay. Could you look at Exhibit 1. That's the September  
10 21 401 at page 26, please.  
11 MS. COTTINGHAM: What number was that again?  
12 MR. EGLICK: Exhibit 1.  
13 A. Okay.  
14 Q. And have you got page 26 there?  
15 A. Okay.  
16 Q. And I believe you were talking about stormwater retrofit  
17 with Mr. Reavis; do you recall that?  
18 A. I do.  
19 Q. And I think your conversation referred explicitly to  
20 subsection C on this page. Do you see that on page 26?  
21 A. I do.  
22 Q. Could you take a look at the first two sentences of the  
23 subsection C and then actually go through to the last  
24 sentence as well and take a minute to read those if you  
25 would, please.

**AR 055188**

1 A. Okay.

2 Q. And then could you tell the board how this relates, if at  
3 all, to reasonable assurance?

4 MR. KRAY: Objection: Vague.

5 MS. COTTINGHAM: Can you restate.

6 Q. Well, does subsection C add, subtract or is it neutral in  
7 terms of providing, not providing reasonable assurance  
8 for a 401 certification?

9 MR. KRAY: Objection: Lack of foundation.  
10 Mr. Luster did not write this 401.

11 MS. COTTINGHAM: Sustained.

12 MR. EGLICK: Well, he is someone who is expert  
13 in 401s and he was asked questions by Mr. Reavis on this  
14 very topic, so I'm just following up on the questions Mr.  
15 Reavis asked.

16 MS. COTTINGHAM: Why don't you lay a  
17 foundation.

18 MR. EGLICK: Okay.

19 Q. Mr. Luster, do you recall discussing with Mr. Reavis a  
20 question of retrofit of stormwater management facilities?

21 A. I do.

22 Q. And do you recall that Mr. Reavis asked you whether or  
23 not this 401 had gone beyond other 401s in including a  
24 retrofit requirement?

25 A. I believe that was the question, yes.

**AR 055189**

1 Q. And I believe you said that you had not seen -- is it  
2 correct you had said you had not seen a 401 before with a  
3 retrofit requirement such as this one?

4 A. Correct.

5 Q. And having responded to Mr. Reavis that way, is it your  
6 testimony that the addition of the retrofit requirement  
7 has any relationship to reasonable assurance?

8 A. I would say this condition doesn't provide adequate  
9 assurance for at least three reasons actually. There are  
10 two statements within this condition that leave it open  
11 to later interpretation as to whether the retrofitting  
12 will occur. The first is near the middle of the  
13 paragraph, if the port demonstrates that the retrofitting  
14 is not feasible for some reason, although that  
15 determination of feasibility is not spelled out here.  
16 Also, the last sentence states that if the retrofitting  
17 conflicts with the construction schedule in some way,  
18 retrofitting may be delayed or not occur. But there  
19 aren't enough specific conditions that would further  
20 describe how and when retrofitting may not occur.

21 Another issue that's not stated here but is directly  
22 related is that if the retrofitting is going to be using  
23 the same BMPs that are currently in place at the airport  
24 and which have been shown to result in exceedances of  
25 numeric criteria from the existing discharges, then the

**AR 055190**

1 retrofitted in and of itself is not enough to determine  
2 or to insure that water quality standards are going to be  
3 met even with the additional amount of impervious surface  
4 being retrofitted.

5 Q. Okay. Thank you. Could you look at Exhibit 221, please.  
6 That's another one that Mr. Reavis brought to your  
7 attention and asked you about, that's the policy  
8 document. And on page 2 of page Exhibit 221, which is  
9 the section B, which is the section that Mr. Reavis asked  
10 you about.

11 A. I've got it.

12 Q. If you look at Exhibit 221, page 2, section B(1), which  
13 is what you were discussing with Mr. Reavis, at the last  
14 sentence, do you recall Mr. Reavis asking you whether  
15 that provision meant that Ecology, and I think he said,  
16 can add conditions to a 401 certification?

17 A. Correct.

18 Q. Can you actually, if you would, read for me the actual  
19 sentence or half a sentence starting with the word  
20 "However."

21 A. "However, additional 401 certification conditions may be  
22 necessary to address compliance for stormwater and other  
23 water quality impacts or project areas not covered by the  
24 402 permit."

25 Q. Now, in your experience at Ecology, how was this

**AR 055191**

1 interpreted and applied?

2 A. Well, generally, the -- well, let me back up. The  
3 standard of review for 401 certification is somewhat  
4 different than that for 402 or NPDES permits. Even when  
5 a 402 permit is in place for a particular project,  
6 through the 401 review, we may find it necessary to add  
7 additional conditions on a number of project aspects,  
8 including, in some cases, discharges associated with  
9 NPDES permits.

10 As I mentioned earlier, section 401(D) requires that  
11 certifications include effluent limitations and  
12 monitoring measures necessary to insure water quality  
13 standards are met. Section 402(A) of the Clean Water Act  
14 instead has a may provision. The permit, the NPDES  
15 permit may include those same provisions or may include  
16 other measures that are meant to get to compliance with  
17 standards over time.

18 This is in part in recognition of the continual  
19 process of the 402 permit is not a one-time decision,  
20 it's upgraded every five years, and eventually if those  
21 measures included in a 402 are put into place, the goal  
22 is to eventually meet water quality standards. With a  
23 401 it's a one-time opportunity for the state to  
24 determine, based on the information available at the  
25 time, that standards will be met.

**AR 055192**

1 Q. Do you recall talking to Mr. Reavis about whether or not  
2 there were standards where a one-hour sample might be  
3 required?

4 A. I do.

5 Q. And I think he also asked you whether there were  
6 standards where a 24-hour sample might be required. Do  
7 you recall that?

8 A. I believe so.

9 Q. Are you aware of any standards established in permits  
10 where a grab sample is utilized by Department of Ecology?

11 A. Yes, I know grab samples are used on a lot of permits.  
12 The one that comes to mind in particular is the recently-  
13 issued NPDES permit for Cascade Pole in Tacoma in which  
14 not only did Ecology determine that single grab samples  
15 were to be used to determine compliance with water  
16 quality criteria, but that permit also included numeric  
17 criteria for stormwater discharges for a number of  
18 contaminants, including copper, which is one of the  
19 contaminants of concern SeaTac Airport.

20 Q. And I believe Mr. Reavis also asked you a question, I  
21 think it was a very short question, he said -- I don't  
22 remember what stream he mentioned, he said one or the  
23 other streams in the airport area are degraded. Do you  
24 recall that?

25 A. I do.

**AR 055193**

1 Q. And you responded yes; is that correct?

2 A. Yes.

3 Q. What did you mean by degraded in response to his  
4 question?

5 A. Well, degraded in the sense of how that applies with the  
6 water quality standards, there are existing beneficial  
7 uses that are expected to be maintained in the various  
8 water bodies. If they are fully supported, then the  
9 stream would not be degraded. A degraded stream often  
10 still exhibits those beneficial uses, though in a lesser  
11 capacity. It's clear from the information I've seen and  
12 from testimony just yesterday from the mayor of Burien  
13 that, for instance, there is fish habitat provided both  
14 Des Moines and Miller Creek. However, that habitat is  
15 not fully functioning due to things like excessive  
16 stormwater runoff, various levels of contaminants in the  
17 creek. But that doesn't mean that because the creek's  
18 degraded, it can be written off. Those uses are still  
19 there and Ecology's decisions are supposed to result in  
20 those uses being fully supported.

21 On a related note, that points out one of the  
22 concerns I have with the difference between requirements  
23 of 401 and the state water quality standards and applying  
24 the use of out-of-basin mitigation in a WRIA.

25 MR. REAVIS: I'm sorry to interrupt the

**AR 055194**



1 witness, but I think he has gone beyond the scope of the  
2 question, which was degraded streams, and I don't know if  
3 a there was a question that this is responsive to.

4 MR. EGLICK: He was answering the question. I  
5 mean, interrupting him just eats up our clock.

6 MS. COTTINGHAM: Why don't you continue.

7 A. Well, my point with bringing in the WRIAs with degraded  
8 streams is if mitigation is done outside of a water body,  
9 instead, in a WRIA situation, that's likely to not result  
10 in that degraded stream having its beneficial uses being  
11 fully supported. You would essentially be creating a  
12 situation where there were continually lessening levels  
13 of beneficial uses in those streams if you did more and  
14 more mitigation outside of that particular water body or  
15 that particular watershed.

16 So, in some cases, I would say a WRIA is an  
17 appropriate place to use as a basis for mitigation, but  
18 if you're dealing with streams that are already degraded  
19 and have lost their resilience to some degree, the  
20 opportunities for those streams to come back and provide  
21 full support is lessened if you do the mitigation outside  
22 of that particular basin.

23 Q. Just to ask you a question for clarification, you have  
24 referred a number of times to beneficial uses. Is that a  
25 term of art in the water quality standards?

**AR 055195**

1 A. That's a specific reference to several points in the  
2 state water quality standards.

3 Q. For background for the board, or maybe I am the only one  
4 that doesn't know, but what's a beneficial use, I guess?

5 A. Well, for instance, under subsection 30 in the standards,  
6 each of the various water quality classifications, class  
7 AA, class A, et cetera, have a specific list of  
8 characteristic uses, such as water supply, fish and  
9 shellfish habitat, those sorts of things. And so those,  
10 along with a whole suite of uses, are meant to be  
11 supported in the various water bodies.

12 Q. Okay. Thank you very much. I don't have any other  
13 questions right now.

14 MS. COTTINGHAM: Any questions from the board?

15 MR. JENSEN: No.

16 MR. LYNCH: I had one question.

17

18 EXAMINATION

19 BY MR. LYNCH:

20 Q. Thank you for your testimony today.

21 I just want to clarify something that I heard you  
22 say earlier when you were talking about in-basin  
23 mitigation being appropriate. When you were talking  
24 about that you found that in-basin mitigation was  
25 appropriate, were you just referring to that you thought

**AR 055196**

1 that these particular wetland sites would, if there was  
2 additional work being done there, that they would provide  
3 good functions, or was there actually some sort of  
4 wildlife damage management biologist who took a look at  
5 these particular sites?

6 A. I believe our determination early on that there should be  
7 in-basin mitigation was based in part on the recognition  
8 that the existing wetlands that were proposed to be  
9 filled were serving some valuable functions to the Miller  
10 and Des Moines Creek watersheds, including water storage  
11 for release during low-flow periods in the creek,  
12 wildlife habitat, stream attenuation. There were a  
13 number of particular aspects that provided support to the  
14 water bodies that were being provided by those wetlands.  
15 And to replace those functions outside of the basin would  
16 have further degraded the two stream systems which would  
17 have resulted in less support for those beneficial uses.

18 As part of the development of the in-basin  
19 mitigation, there was a lot of discussion about how to  
20 provide mitigation sites that close to the airport  
21 without creating additional wildlife hazard. I know the  
22 port has a wildlife hazard mitigation plan that allows  
23 them to -- if, for instance, situations develop where  
24 flocking birds are attracted to these wetland areas near  
25 the airport, the port could go in and either remove the

**AR 055197**

1 birds themselves or modify the conditions, the vegetation  
2 in those wetlands that provide the habitat for those  
3 flocking birds. So did that answer your question?

4 Q. I guess what I'm exploring is I'm not real sure how  
5 wildlife damage management plans work, but I was  
6 wondering if in looking at these potential sites for  
7 mitigation, was it ever discussed about how this wildlife  
8 damage management plan could be modified to allow these  
9 particular sites to be mitigated?

10 A. Yes, there were several discussions over a period of  
11 time. Part of that was a learning process for Ecology to  
12 determine if we said that a certain in-basin mitigation  
13 plan was appropriate, what certainty would we have that  
14 the functions anticipated for that mitigation would  
15 continue even with certain types of wildlife control.  
16 And so in reviewing the port's wildlife plan and looking  
17 at the kinds of measures that they used or proposed to  
18 use, there's certain limitations and a process to go  
19 through that. For instance, if there's a problem with  
20 flocking birds, the first thing to do is not to go in and  
21 cut down all the trees. There are steps to take before  
22 that. If the wetland is meant to support a certain  
23 amount of tree cover or scrub shrub habitat, the first  
24 step in the wildlife plan is not to go in and take out  
25 that type of vegetation but to do various hazing methods

**AR 055198**

1 perhaps that would disrupt the bird life but would not  
2 disrupt other valuable functions in the wetland. Does  
3 that --

4 Q. Yes, thank you.

5 MS. COTTINGHAM: Any more questions?

6

7

EXAMINATION

8

BY MS. COTTINGHAM:

9 Q. I have one question that relates to your prefilled direct  
10 testimony, and it's somewhat related, I believe, to the  
11 last question. I'd like to know whether a change  
12 occurred and whether it occurred while you were still  
13 working on the project. You state that "The proposal for  
14 wetland mitigation occurring primarily outside the  
15 locally affected watershed was largely a residual of the  
16 port's initial contention that the FAA would not allow  
17 wetland mitigation," et cetera, et cetera. Did the FAA  
18 change its position and did that happen while you were  
19 working on the project or subsequently?

20 A. I'm not aware of the FAA changing its position. It was  
21 more an interpretation of a guidance document that the  
22 FAA provided. The port and Ecology had different  
23 interpretations of that document. Basically, it says you  
24 can't create wildlife hazards within 10,000 feet of an  
25 active runway. The port initially presented that as a

**AR 055199**

1 reason to do mitigation outside of that zone. Ecology's  
2 position was that as long as the mitigation did not  
3 create that wildlife hazard within that distance, then  
4 mitigation could occur within the 10,000-foot boundary.

5 And so I don't know that it was a change in FAA  
6 guidance at all, but it was more the port and Ecology  
7 coming to a common understanding that it would be  
8 acceptable and appropriate to do in-basin mitigation even  
9 with that guidance document in place.

10 I believe the guidance document predated the port's  
11 submittal for their 401 application, so it was in place  
12 all along, is what I recall.

13 MS. COTTINGHAM: Okay. Are there any  
14 questions as a result of the board's questions?

15 MR. LYNCH: That's Exhibit 1080, that  
16 directive.

17 MS. COTTINGHAM: 1080. Any questions?

18 MR. REAVIS: No.

19 MS. COTTINGHAM: You're excused, Mr. Luster.  
20 Thank you. Mr. Eglick, you may call your next witness.

21 MR. EGLICK: Yes, thank you. Amanda Azous.

22 ////

23 ////

24 ////

25 ////

**AR 055200**

1           AMANDA L. AZOUS, having been first duly sworn on oath or  
2           affirmed to tell the truth, the whole truth and nothing  
3           but the truth, testified as follows:

4

5

EXAMINATION

6

BY MR. EGLICK:

7

Q. Could you state your full name and address for the  
8           record, please.

9

A. Amanda Louise Azous.

10

                  MS. COTTINGHAM:    Would you please spell your  
11           last name.

12

                  THE WITNESS:    A-Z-O-U-S.

13

Q. And you'll need to speak up a little bit, I think,  
14           because these don't amplify, they just record, I think.  
15           I'm not sure what they do. And your vita is attachment A  
16           to your prefiled testimony; is that correct?

17

A. That's correct.

18

Q. Okay. Miss Azous, because we are short on time, I'm  
19           going to just ask you a few clarifying questions on your  
20           prefiled. Starting on page 4 of your prefiled testimony,  
21           you discuss cumulative impacts, I believe, on the Miller  
22           Creek watershed; is that correct?

23

A. Yes, that's correct.

24

Q. And in the earlier NRMPs prior to the current one, was  
25           there such an analysis?

**AR 055201**

1 A. I don't recall this analysis until the most recent NRMP.

2 Q. And have you had a chance to review the prefiled  
3 testimony of James Kelley?

4 A. Yes, I have.

5 Q. And does that now include an analysis that more or less  
6 parallels or responds to yours and your prefiled  
7 testimony?

8 A. Yes.

9 Q. Can you explain just an overview for the board what the  
10 bottom line of your analysis was for the Miller Creek  
11 watershed?

12 A. The bottom line of my analysis was that if you looked at  
13 wetlands that were riparian wetlands located adjacent to  
14 Miller Creek, therefore, hydrologically connected to  
15 Miller Creek, if you looked at the proportion of riparian  
16 wetlands that were being eliminated as a result of this  
17 project, it was approximately 21 percent of the total  
18 riparian wetlands in the Miller Creek watershed.

19 Q. And is that a fact the board should have any particular  
20 reaction to in your expert opinion as a wetland  
21 scientist?

22 A. I believe it's a significant proportion. It's a fairly  
23 old well-developed watershed, there aren't that many  
24 wetlands remaining in it, so to remove such a large  
25 proportion will remove significant functions that are

**AR 055202**



1           afforded by these wetlands.

2           Q.   Have you had a chance to look at Dr. Kelley's new  
3           analysis that parallels yours, so to speak?

4           A.   Yes.

5           Q.   And does that agree with yours in terms of the percentage  
6           figure that you've given the board?

7           A.   No.  Dr. Kelley, as I recall, comes up with approximately  
8           8 percent of the wetlands in the Miller Creek basin will  
9           be removed as a result of the project.

10          Q.   And can you, I guess we don't have time to go through  
11          every reason, but have you been able to discern some  
12          reasons as to what the difference is between your  
13          analysis and his?

14          A.   Yes, I have.  There are approximately three that I have  
15          identified major differences between our analyses.  The  
16          first is that Dr. Kelley included lakes and I did not  
17          include lakes.  Lakes are different than wetlands and  
18          they provide different kinds of functions.

19          Q.   So when you say included lakes, you mean included them in  
20          what?

21          A.   In the total of wetlands that are hydrologically  
22          connected within the Miller Creek watershed.

23          Q.   So he included those in the universe of wetlands that are  
24          not being eliminated, so to speak?

25          A.   Yes.  And by doing that, it reduces the proportion that

**AR 055203**

1 are being eliminated.

2 Q. Okay. Go ahead. I'm sorry.

3 A. The second one is that Dr. Kelley -- to back up, I used  
4 the wetlands that were identified in the NRMP as riparian  
5 in my analysis and then also used the wetland inventories  
6 from cities of Normandy Park, Des Moines and Burien to  
7 augment that. Dr. Kelley has prepared a new list which  
8 shows new wetlands as riparian that in the NRMP were not  
9 listed as riparian, so that significantly increases the  
10 acreage of wetlands that he is including.

11 Some of these wetlands that he has included are  
12 separated by roads from Miller Creek, and it's difficult  
13 to see how that is a direct hydrologic connection to the  
14 creek.

15 The third thing that Dr. Kelley included, which I  
16 did not, was he included the wetlands of Walker Creek.  
17 And I don't know if the board is familiar with how Miller  
18 Creek interacts with Walker Creek, but they are  
19 essentially in two separate watersheds and connect near  
20 the coast of Puget Sound.

21 Q. Would it be possible, could you perhaps illustrate that  
22 on either -- there are I think two aerial photos there  
23 which are in the record as Exhibit 675 and then behind  
24 them is just an illustrative map that shows the area.  
25 Would either of those be helpful?

**AR 055204**

1 A. This one should help, I think. So here is Miller Creek,  
2 if you can follow my finger pointing here, and then  
3 Walker Creek begins up here and you can see it kind of  
4 flows parallel to Miller Creek and it just joins right  
5 here just before the discharge point. So what that means  
6 is that Miller Creek is not or, excuse me, Walker Creek  
7 watershed is not really influencing the stream condition  
8 food web dynamics of Miller Creek.

9 Q. Okay. Thank you. And, now, your prefiled testimony also  
10 addressed the question of how functional assessments were  
11 performed by the port on the wetlands affected by the  
12 third runway project; is that correct?

13 A. That's correct.

14 Q. And can you explain briefly what is a functional  
15 assessment?

16 A. A functional assessment is methods that are used in order  
17 to evaluate and quantify the functions that wetlands  
18 afford.

19 Q. We always hear about wetland delineations. What's the  
20 difference between a functional assessment and a wetland  
21 delineation?

22 A. A wetland delineation is where you're using a protocol to  
23 establish where the boundary of a wetland occurs as  
24 compared with its upland.

25 A functional assessment is a method to actually

**AR 055205**

1           quantify the functions offered by that wetland.

2    Q.   And so those are two different processes; is that

3           correct?

4    A.   That's correct.

5    Q.   And when you said wetland delineation, you mentioned

6           using a protocol.  What does that mean?

7    A.   There's a standard method for wetland delineations that

8           everybody uses.

9    Q.   And when you say everybody, it's a peer-reviewed method?

10   A.   Yes.

11   Q.   Okay.  Are there peer-reviewed methods for going through

12           the functional assessment process for wetlands?

13   A.   Yes, there are.

14   Q.   Okay.  Was a peer-review method used by the port for

15           doing functional assessment on its wetlands?

16   A.   No, it wasn't.

17   Q.   And can you explain how you know that?

18   A.   Well, in the wetland functional assessment document, it

19           describes in a couple of paragraphs that Dr. Kelley

20           assembled a method to use on these particular wetlands

21           because he didn't, as I understand from his testimony, he

22           didn't think that the standard methods would be

23           particularly useful in these watersheds.

24   Q.   Okay.  If one uses a peer review or standard method, as

25           you put it, a functional assessment, is there some way

**AR 055206**

1 for someone else to replicate that?

2 A. If the methods are published, it's possible to replicate  
3 it.

4 Q. To your knowledge, is the method the port used here  
5 published anywhere?

6 A. To my knowledge, it isn't. I haven't seen any published  
7 protocols in the documentation.

8 Q. I did want to ask you a question. You had an attachment  
9 to your prefiled testimony, I think you referred to  
10 attachment D in your prefiled testimony, but then the  
11 attachment was actually something different. I'm  
12 wondering if you can explain that for the board because  
13 that may have generated some confusion.

14 A. Yes. In my testimony I referred to attachment D of Dr.  
15 Kelley's declaration.

16 Q. That was on the stay?

17 A. On the stay.

18 Q. Okay.

19 A. Which I believe was dated October 1st. And that is what  
20 I used in my analysis of the wetland mitigation package.  
21 At the time there were several versions of the wetland  
22 mitigation package to review, which made it a little bit  
23 confusing. There was attachment D in Dr. Kelley's  
24 declaration, there was a different version that was in  
25 Eric Stockdale's declaration, and then, most recently, in

**AR 055207**

1 the pretrial written testimony, there were also two  
2 separate versions from those initial versions and Dr.  
3 Kelley's and in Eric Stockdale's testimony. So it's been  
4 a little bit confusing trying to hone in on which package  
5 is the one we're supposed to be evaluating.

6 Q. And when you say they're different, are they different in  
7 substantive respects?

8 A. Yes, different in how they view wetlands restoration  
9 versus enhancement, particularly in the Vacca Farm area.

10 Q. Could you explain what you mean by particularly in the  
11 Vacca Farm area? Let's take that as an example.

12 A. Well, the attachment D of Dr. Kelley's deposition did not  
13 mention the Lora Lake restoration, so I did not include  
14 that when I was analyzing the mitigation package. It was  
15 included as a buffer enhancement at that time. It then  
16 was changed, altered so that part of it was considered a  
17 restoration and then the actual acreage of that  
18 restoration varies. In Dr. Kelley's it's approximately  
19 11.95 acres, as I recall, and then in Mr. Stockdale's  
20 it's 6.6 acres.

21 Q. Okay, so if I can just make sure I understand this and  
22 for the board's help with the exhibit number, attachment  
23 D, which is Exhibit 1011, calls out Lora Lake as what in  
24 terms of wetlands, as a restoration?

25 A. As a buffer enhancement.

**AR 055208**

1 Q. A buffer enhancement. Does that get a ratio of credit  
2 of a particular sort?

3 A. Yes, it's 1-to-5 ratio.

4 Q. What does that ratio mean by the way when you saw one to  
5 five?

6 A. It means that for every acre of enhancement, you would  
7 get, excuse me, for five acres of enhancement, you would  
8 get one acre of credit.

9 Q. Now, that's attachment D, 1011, which is, I think you  
10 said, October 1st. And now let's move forward into time  
11 to the prefiled testimonies that you've reviewed and your  
12 own prefiled testimony. What is the current, and if it's  
13 more than one, what are the current claims for Lora Lake?

14 A. The current claim for Lora Lake in the revised November  
15 NRMP, dated 2001, is that there's one acre of restoration  
16 allocated to Lora Lake which receives one mitigation  
17 credit, and under buffer enhancement, there's 1.81 acres  
18 of enhancement, buffer enhancement, which at the 1-to-5  
19 ratio is given a credit of .36 acres.

20 Q. So some shifted from the you only get 5-to-1 or 1-to-5  
21 credit to the 1-to-1 credit column between October 1 and  
22 the November NRMP; is that right?

23 MR. PEARCE: Objection. Lack of foundation.  
24 There's been no showing that they're talking about  
25 exactly the same thing.

**AR 055209**

1 MS. COTTINGHAM: I'm back on the fact that I'm  
2 not tracking you.

3 MR. EGLICK: I apologize for that.

4 MS. COTTINGHAM: So I'm not ruling on the  
5 objection, I'm just --

6 MR. EGLICK: I appreciate your telling me that.

7 Q. Ms. Azous, is there more than one Lora Lake in the  
8 airport area that you know of?

9 A. No.

10 Q. And is Lora Lake a term that's used throughout the NRMPs  
11 for the third runway project?

12 A. There is a Lora Lake that's referred to in the NRMP that  
13 I believe is the same one they're referring to, if that's  
14 your question.

15 Q. And in attachment D, which is the exhibit that was  
16 attached to Dr. Kelley's stay opposition declaration, is  
17 Lora Lake referred to?

18 A. Under buffer enhancement, yes.

19 Q. And is Lora Lake referred to in its entirety under buffer  
20 enhancement or is it broken down into particular  
21 fragments?

22 A. It's only mentioned once under buffer enhancement.

23 Q. Looking to the current NRMP, which is Exhibit 2014, is  
24 Lora Lake mentioned in the current NRMP in terms of  
25 wetland mitigation credit?

**AR 055210**



1 A. Yes, it is.

2 Q. And is the credit given in the same amount and in the  
3 same way as in Exhibit 1011, attachment D?

4 A. No.

5 Q. Okay. And what's the difference?

6 A. There is some more credit given and it includes an acre  
7 of restoration and 1.81 acres of buffer enhancement.

8 Q. So does that mean, then, that the port got more credit  
9 for the same work in Exhibit 2014, the latest version of  
10 the NRMP, than it did a month earlier?

11 MR. PEARCE: Objection, lack of foundation.

12 MR. EGLICK: I think I just laid the  
13 foundation.

14 MR. PEARCE: Laid no foundation that it's the  
15 same work.

16 MR. EGLICK: Well, okay.

17 MR. PEARCE: That it's the same site.

18 Q. (Continuing By Mr. Eglick): Is there any information  
19 whatsoever in the latest NRMP, the Exhibit 2014, NRMP  
20 that suggests that the proposed mitigation work at Lora  
21 Lake has changed between October 1 and November, which is  
22 the date of Exhibit 2014, the latest NRMP?

23 A. Yes.

24 Q. Go ahead.

25 A. Well, I hope I got your question right or clear in my

**AR 055211**

1 head. But there's added area, there's addition of  
2 wetland restoration area, there is buffer enhancement,  
3 but it's been increased.

4 Q. Is the work that's proposed for Lora Lake between October  
5 and November, not the credit, but is the work proposed  
6 for Lora Lake between October and November different?

7 A. Yes, it is different.

8 Q. And is it sufficient to support the difference in credit  
9 offered?

10 A. I am sorry, could you --

11 Q. Is the work different sufficient to support the  
12 difference in credit that is ascribed to it?

13 A. I'm unclear because they talk about wetland restoration  
14 -- well, I guess my question is am I looking at Ecology's  
15 version of the mitigation package or am I looking at Dr.  
16 Kelley's version of the mitigation package, and it's  
17 fairly complex, because in the NRMP, they talk about Lora  
18 Lake, if you look at -- they have a breakdown of Lora  
19 Lake that shows three acres of aquatic habitat  
20 restoration, which it's unclear how that then figures  
21 into these numbers for mitigation for actual restoration.

22 MS. COTTINGHAM: Could you identify an exhibit  
23 number that we might all be on.

24 Q. Ms. Azous, are you referring to the NRMP, Exhibit 2014?

25 A. Yes, I am, and I'm looking at page 5-3, table 5.1-1.

1 MR. POULIN: Could you repeat that so the board  
2 can find its copies.

3 THE WITNESS: Yes.

4 MS. COTTINGHAM: What page?

5 THE WITNESS: Page 5-3 and it's the table on  
6 that page.

7 A. I'm just going to compare table 4.1-3, which is on page  
8 4-13 of the same document, with this table 5.1-1. And  
9 this table 5.1-1 talks about mitigation area at Vacca  
10 Farm, and under wetland enhancement, it lists Lora Lake  
11 shoreline of .32 acres, and then here under --

12 Q. Where is here when you're saying here?

13 A. And then on that same table, it says Lora Lake aquatic  
14 habitat and it gives 3.06 acres in this table. So now if  
15 we look on table 4.1-3, what we see for Lora Lake is 1  
16 acre of restoration, and under buffer enhancement, 1.81  
17 acres of buffer enhancement.

18 MS. COTTINGHAM: Can you repeat that?

19 THE WITNESS: Yes.

20 MS. COTTINGHAM: Not the 5.1, but the 4.1-3.

21 THE WITNESS: 4.1-3 under wetland restoration,  
22 it says, "Remove fill adjacent to Lora Lake," so you have  
23 1 acre there, and then under buffer enhancement, the  
24 third section, it says Lora Lake and if you move across,  
25 1.81 acres of buffer enhancement. So it's unclear what's

**AR 055213**

1 actually happening here.

2 Q. (Continuing By Mr. Eglick): You also mentioned Vacca  
3 Farm. With regard to Vacca Farm, has there been a change  
4 in how Vacca Farm is characterized between the October 1  
5 attachment D, which is Exhibit 1011, and the latest  
6 submissions from the respondents?

7 MR. PEARCE: Object as vague. I'm not sure  
8 what he is talking about.

9 Q. (Continuing By Mr. Eglick): Let's take them one at a  
10 time then. Has Ecology changed how it recognizes and  
11 provides mitigation credit for Vacca Farm?

12 A. Yes, there is a difference. I do not have Ecology  
13 testimony in front of me, but, as I recall, there is a  
14 table in there in Mr. Stockdale's testimony and it talks  
15 about Vacca Farm as being granted a total of 6.6 acres of  
16 mitigation credit, although it's listed under  
17 restoration. And all of the other parts of restoration  
18 get a 1-to-1 credit. So that has been, from what I  
19 understand, reduced.

20 Q. Reduced from what?

21 A. Well, it was originally 6.6 acres of restoration credit  
22 for 6.6 acres of actual restoration. Now it's 6.6 acres  
23 of actual restoration, but it's given a 2-to-1 credit, so  
24 it's 3.3 approximately.

25 Q. Now, what is the status from your review of Vacca Farm in

**AR 055214**

1 terms of being a wetland or not?

2 A. As I understand it, Vacca Farm is a jurisdictional  
3 wetland, it meets the three parameters which are used to  
4 define wetlands in Washington State and under Department  
5 of Ecology's guidelines, it would be considered  
6 jurisdictional.

7 Q. Well, in that case, how could Vacca Farm have ever been  
8 given restoration credit?

9 A. I don't know.

10 Q. Can you restore an existing wetland?

11 A. The definition of restoration is to restore something  
12 that isn't there, so normally you're not given  
13 restoration credit for a wetland that's already in  
14 existence.

15 Q. Now, in your review of Dr. Kelley's prefiled testimony,  
16 has he continued to or does he assert that Vacca Farm is  
17 a wetland?

18 A. He asserts that Vacca Farm is a prior converted crop  
19 land, which does meet the definition of wetland but is  
20 viewed differently from the perspective of the Army Corps  
21 of Engineers.

22 Q. So is the port then, as you understand it, still asking  
23 for wetland restoration credit for Vacca Farm?

24 A. Yes.

25 Q. When you said you were referring to definitions of

**AR 055215**

1 restoration, what do you rely on for your understanding  
2 of the definition of a wetland restoration?

3 A. I rely on the definition that's contained in the  
4 Washington Administrative Code, it's chapter 173-700 part  
5 2, and it's very specific about what is the difference  
6 between restoration and enhancement. It says that  
7 "Enhancement are actions that are taken to augment one or  
8 more functions in an existing degraded wetland system or  
9 to improve functions in an upland area." And that  
10 describes the majority of activities that are occurring  
11 in this mitigation plan.

12 Restoration, the definition, the WAC defines as  
13 "Actions taken to reestablish wetland area and values  
14 where wetlands previously existed but are currently  
15 absent."

16 Q. What is the significance or can you tell us what the term  
17 hydro period means?

18 A. Hydro period is a term that defines water depth over time  
19 in an area, and it's used to understand the relationship  
20 between water in a wetland and the biological communities  
21 that result from that.

22 Q. Is that something that can be measured?

23 A. Yes, it can.

24 Q. And what is your testimony with regard to whether hydro  
25 periods have been measured with regard to the third

**AR 055216**

1 runway project for wetlands?

2 A. There are some groundwater wells that have been  
3 monitored. There's been sporadic data that I have seen.  
4 The majority of it has been in the year 2001 and 2002.

5 Q. So have hydro periods been measured then for the project  
6 area wetlands?

7 A. Not entirely, no.

8 Q. And would it be possible to measure hydro periods for  
9 those wetlands?

10 A. Yes, it would.

11 Q. Have you had a chance to review Ms. Walter's prefiled  
12 testimony which states -- what does Miss Walter's  
13 prefiled testimony state with regard to measuring hydro  
14 periods for wetlands?

15 A. She states that it's difficult, if not impossible, to  
16 quantify a hydro period for the slope wetlands that drain  
17 to Miller Creek.

18 Q. And is that correct from your expert opinion?

19 A. No, it's not. The key to measuring hydro period in a  
20 slope wetland would be to look at groundwater levels over  
21 time, so what we want to know is what is the depth to  
22 saturation, we want to know that seasonally and monthly,  
23 because it could, depending on hydrology in the  
24 watershed, could vary over a monthly period and would  
25 certainly probably vary seasonally.

**AR 055217**

1           These variations help determine the range of species  
2           that can tolerate the conditions. If you have a hydro  
3           period where there is a large difference between the  
4           maximum and minimum that occurs monthly, or occurs  
5           seasonally, that will alter the diversity of species that  
6           can inhabit that wetland. And what we found in research  
7           study is that the more extreme conditions there are, the  
8           fewer species are able to tolerate them. So if you have  
9           highly-fluctuating groundwater levels, you tend to reduce  
10          the number of species that live there.

11        Q. Now, just I think we gave your book as Exhibit B,  
12          "Wetlands and Urbanization." Does that address in part  
13          quantification of hydro periods?

14        A. It does talk about quantifying hydro periods and the  
15          importance of it. We were focusing on wetlands there  
16          that were depressional flow-through wetlands primarily,  
17          which is a little different type of wetland than the  
18          slope wetlands that Miss Walter was talking about;  
19          however, the same strategy would apply.

20        Q. And hydro period then, how does that relate to hydrology,  
21          if at all?

22        A. Well, technically, hydrology is the study of water, but  
23          it's used routinely to describe how water is working in  
24          the landscape. Hydro period is the actual graph, if you  
25          will, that would show water depth over some period of

**AR 055218**



1 time.

2 Q. And then is determining hydro period important to  
3 determining hydrology for a wetland?

4 A. Hydro period is important to understanding whether you  
5 protected the functions of that wetland if you're  
6 altering it in any way or altering the area.

7 Q. Are there various determinants of wetland and stream  
8 character?

9 A. Could you be clearer with your question.

10 Q. Sure. Are there various things that help characterize  
11 what type of wetland a wetland is?

12 A. Yes.

13 Q. And can you tell us what some of the more salient ones  
14 are?

15 A. Are you asking me about things such as habitat classes  
16 and --

17 Q. No, I'm not asking about classes, but, in other words, if  
18 you're trying to determine what makes a wetland a  
19 particular type of wetland in terms of its physical  
20 functioning, for example, what are the determinants you  
21 look at?

22 A. Well, you would look at its hydrology would be a  
23 significant one. You would look at its habitat  
24 classifications. You would look at its relationship to  
25 the landscape it's in.

**AR 055219**

1 Q. If you had to pick, you just mentioned three, are there  
2 any others that are important?

3 A. Well, there are a lot of factors that are important in  
4 looking at a wetland. I guess it would depend on what  
5 you're -- the reason you're looking at it.

6 Q. What's the most important determinant of wetland  
7 character?

8 A. The most important determinant of wetland character would  
9 be hydrology.

10 Q. Okay.

11 A. That's stated in a lot of literature and identified by  
12 Mitsch in his bible of wetlands called "Wetlands."

13 Q. Whose Mitsch?

14 A. He's an author.

15 Q. Mitsch is a last name?

16 A. Last name. Wetland scientist. And all of us experts  
17 have used his book in these proceedings.

18 Q. And Mitsch says that hydrology is the single most  
19 important determinant of wetland character, is that --

20 A. That's right.

21 Q. Let me just check my notes here. Are you familiar with  
22 the term adaptive management?

23 A. Yes, I am.

24 Q. Can you explain what your understanding is of adaptive  
25 management with regard to your area of wetlands?

**AR 055220**

1 A. Yes, adaptive management is a concept that was developed  
2 by Holling, and I forget the other person's name, I think  
3 his name is Walter, I'm not sure. And it was developed  
4 in the '80s, and the idea is that we don't know  
5 everything about ecosystem processes and we're very often  
6 wrong so we want to take an experimental approach. And  
7 the idea was to create a process so that that could occur  
8 in the permitting system. So the idea is that you have a  
9 concept of what the outcome will be from your project and  
10 then you monitor it, and then if there's a change, you  
11 alter your management in order to improve it, all the  
12 while moving towards the goals you've set for that  
13 mitigation project.

14 Q. Now, in your opinion, is adaptive management an  
15 appropriate tool for reaching reasonable assurance with  
16 regard to the third runway project?

17 MR. PEARCE: Objection, calls for legal  
18 conclusion.

19 MS. COTTINGHAM: Sustained.

20 Q. (Continuing By Mr. Eglick): In your opinion, is  
21 adaptive management an appropriate tool for assuring that  
22 there will not be wetland degradation with regard to the  
23 third runway project?

24 A. Adaptive management in this case is being used to adapt  
25 management to protect remaining wetlands, it's not just

**AR 055221**

1 being used to adapt management for the mitigation sites.  
2 That's where I have a problem with it. Because,  
3 essentially, we're being told that protecting remaining  
4 wetlands is an experiment.

5 Q. And, finally, could you explain the term riparian  
6 wetland?

7 A. A riparian wetland is a wetland that is adjacent to a  
8 creek or river system.

9 Q. And what about the term riparian buffer?

10 A. A riparian buffer is an upland that's located adjacent to  
11 a creek or river system.

12 Q. So can a riparian buffer be a wetland?

13 A. A riparian wetland can be in the buffer of a stream or  
14 river, but a riparian wetland is not the same as a  
15 riparian upland.

16 Q. Okay. Thank you. No other questions.

17 MS. COTTINGHAM: Mr. Poulin do you have any  
18 questions?

19 MR. POULIN: I do, just a couple.

20

21 EXAMINATION

22 BY MR. POULIN:

23 Q. Miss Azous, early on in your testimony you talked about  
24 the difference between lakes and wetlands in the Miller  
25 Creek drainage, and Dr. Kelley's different approach to

**AR 055222**

- 1           that process. Do you know whether Dr. Kelley included  
2           Lake Reba among the lakes that he counted as wetlands?  
3    A.   Offhand, I don't know. I could check, though. I think I  
4           have --  
5    Q.   It's not worth a lot of time, but if you have the answer  
6           at your fingertips.  
7    A.   I am not sure. I would have to go through this in more  
8           detail.  
9    Q.   That's fine. Thank you. No further questions.

10                           MS. COTTINGHAM: Port or Ecology.

11                           MR. PEARCE: I think I'll start.

12

13

EXAMINATION

14

BY MR. PEARCE:

15    Q.   Good afternoon, Miss Azous. I'm Roger Pearce. We met at  
16           your deposition.

17                    You're not trained as a fisheries biologist, are  
18           you, Miss Azous?

19

A. No.

20

Q. You're not an engineer?

21

A. No. Well, I have training as an engineer, but I'm not a  
22           licensed engineer.

23

Q. You are not a hydrogeologist?

24

A. No.

25

Q. You don't have any expertise in embankment wall design?

**AR 055223**

1 I think we talked about that at your deposition.

2 A. That's right.

3 Q. That's right, you don't?

4 A. I don't.

5 Q. Neither do I. You talked some about the percentages of  
6 wetlands hydrologically connected to Miller Creek. Do  
7 you recall that discussion with Mr. Eglick?

8 A. Yes.

9 Q. Were you talking about the entire watershed for Miller  
10 Creek?

11 A. Yes, I was.

12 Q. And is it your testimony that the watershed from Miller  
13 Creek does not include Walker Creek?

14 A. No, that's not my testimony.

15 Q. I'm confused as to where you were counting wetlands then.

16 A. I was counting wetlands that are adjacent to, riparian to  
17 Miller Creek itself.

18 Q. But not to Walker Creek?

19 A. No, Walker Creek is in its own subbasin.

20 Q. It's tributary to Miller Creek, though, right?

21 A. At the discharge point, yes.

22 Q. I think you commented in your deposition that your  
23 analysis of the number of wetlands was a fairly rough  
24 analysis based on using aerial photographs; do you recall  
25 that?

**AR 055224**

1 A. I used aerial photographs, the wetland inventories of the  
2 cities I mentioned, and primarily I used the port's data.

3 Q. And the port's data only includes the data on site,  
4 doesn't it?

5 A. Yes.

6 Q. Doesn't include other wetlands from Miller Creek?

7 A. No.

8 Q. Aerial photos are a difficult way to define wetlands, are  
9 they not?

10 A. Yes, it is.

11 Q. So you can miss a lot of wetlands doing that; isn't that  
12 correct?

13 A. It's possible to miss wetlands using aerial photographs.

14 Q. Isn't that what happened at this site, in fact, in  
15 between the 1996 EIS and when the port was actually able  
16 to go on to that property and delineate the wetlands on  
17 the property?

18 MR. EGLICK: Objection: No foundation.

19 MS. COTTINGHAM: Sustained.

20 Q. (Continuing By Mr. Pearce): Are you familiar with any  
21 changes in the wetland estimates over the years on the  
22 west side of the airport, the area covered by the port's  
23 master --

24 MR. EGLICK: Objection: Vague. Are we  
25 talking about estimates of numbers of wetlands,

**AR 055225**

1 mitigation credit?

2 MS. COTTINGHAM: Why don't you be clearer in  
3 your question.

4 Q. (Continuing By Mr. Pearce): With respect to estimates of  
5 actual wetlands on the ground, on the master plan update  
6 project site, are you aware that the earlier estimate of  
7 wetlands was increased after the port was actually able  
8 to get on the site?

9 A. I'm aware that the estimates of wetlands have increased a  
10 couple of times; I'm not clear about the reasons.

11 Q. So you don't know why?

12 A. Why the estimates have increased?

13 Q. Right.

14 A. There are several different instances of that occurring,  
15 as I recall, so I'm not clear of the reasons, no.

16 Q. Are you aware of the estimate that was based on aerial  
17 photographs prior to the port being able to access those  
18 sites and actually delineate the wetlands?

19 A. I don't know what those estimates were, no.

20 Q. But actual on-the-ground calculations are more accurate  
21 than a rough analysis using aerial photographs, are they  
22 not?

23 A. On-the-ground calculations would be preferable to using  
24 only aerials.

25 Q. So if Dr. Kelley had on-the-ground analysis for reaches



1 of Miller Creek further to the north, that would be more  
2 accurate than your rough analysis based on aerial  
3 photographs, would it not?

4 MR. EGLICK: Objection as to the form of the  
5 question; mischaracterizes the testimony.

6 MS. COTTINGHAM: Sustained.

7 MR. PEARCE: I don't think it mischaracterizes  
8 her testimony. She said it was a fairly rough analysis.

9 MR. EGLICK: May I speak. I think the  
10 mischaracterization had to do with what Miss Azous said  
11 she based her estimates on, it wasn't just on the aerial  
12 photos, and that was built right into the question.

13 Q. (Continuing By Mr. Pearce): You said you based your  
14 estimates on aerial photographs, right?

15 A. Aerial photographs in addition to the inventories and the  
16 port's data, yes.

17 Q. And the inventories of the city of Des Moines and city of  
18 Normandy Park, do you have any idea what they were based  
19 on?

20 A. I know that they started with the King County wetlands  
21 inventory and then augmented.

22 Q. Do you know how the King County wetlands inventory was  
23 arrived at?

24 A. It's produced through aerial photographs and also  
25 on-the-ground surveys.

**AR 055227**

1 Q. So it's not a complete delineation?

2 MR. EGLICK: Objection as to the form of the  
3 question.

4 Q. (Continuing By Mr. Pearce): It doesn't go out and  
5 delineate the whole of Miller Creek basin; is that  
6 correct?

7 A. What doesn't go out and delineate the whole of Miller  
8 Creek basin?

9 Q. The King County inventory, so actual on-the-ground  
10 delineation?

11 A. Well, the King County inventory does not include -- not  
12 all the wetlands in the inventory have been actually  
13 delineated using the protocols that are standard.

14 Q. And the inventory maps that you used from the city of Des  
15 Moines, the city of Burien, those are not actual  
16 on-the-ground delineations where they went out and  
17 surveyed every property in that basin; is that correct?

18 A. I don't know. I think it was a mix.

19 Q. Is there any scientific article showing that a particular  
20 percentage of wetlands being eliminated is significant?

21 A. I don't know of any particular articles that identify any  
22 threshold; it's really dependent on the watershed you're  
23 looking at.

24 Q. And the particular scientist using their best  
25 professional judgment?

**AR 055228**

1 A. A lot of it would probably be best professional judgment  
2 under these circumstances.

3 Q. You talked somewhat about buffers in your testimony,  
4 about them already being protected, and you referred to  
5 the King County code. Is this area governed by the King  
6 County code, the area of the airport?

7 MR. POULIN: Objection: Calls for a legal  
8 conclusion.

9 MR. PEARCE: She said that it applied in her  
10 testimony. If you want to strike that portion of her  
11 testimony, I'll withdraw the question.

12 MR. EGLICK: Well, I'll object to that.  
13 That's not what her testimony said; her testimony  
14 referred to the SeaTac code and King County code, but it  
15 didn't say these apply.

16 MS. COTTINGHAM: I'm going to sustain. Why  
17 don't you lay a foundation.

18 Q. (Continuing By Mr. Pearce): Is it your understanding  
19 that the King County code applies to the area around the  
20 airport?

21 A. I had understood that it would be the city of SeaTac's  
22 code.

23 Q. Is it your understanding the city of SeaTac's code  
24 applies to the airport?

25 A. Yes.

**AR 055229**

1 Q. Are you familiar with the interlocal agreement between  
2 the port and the city of SeaTac regarding the regulation  
3 of airport uses?

4 A. I have heard of that agreement.

5 Q. You haven't referenced it or read it?

6 A. No.

7 Q. Are you familiar with the Washington Revised Airports  
8 Act?

9 A. No, I'm not.

10 Q. You're not familiar with the provisions of the Revised  
11 Airports Act that talk about airport jurisdiction over  
12 its property?

13 MR. EGLICK: Objection as to the form of the  
14 question; no foundation. If Mr. Pearce wants to testify  
15 as to --

16 MR. PEARCE: We'll put the act in. I'll  
17 withdraw the question.

18 MR. EGLICK: Miss Cottingham, I guess I'm  
19 going to ask that if we knew we were putting the act in  
20 and we knew that this was an inappropriate question to  
21 ask the witness, maybe we could have skipped the  
22 theatrics.

23 MR. PEARCE: I apologize, Peter, if I asked an  
24 inappropriate question there's no foundation for.

25 Q. For these particular streams, Miller Creek in particular,

**AR 055230**

1 even if the buffers are regulated, the existing uses  
2 could continue, could they not?

3 A. Yes.

4 Q. So regulation of buffers doesn't mean that mitigation of  
5 those buffers has to occur, does it?

6 A. What project are you talking about?

7 Q. Miller Creek. Well, right now, for example, on Miller  
8 Creek, there's a farming use adjacent to Miller Creek all  
9 the way up to the edge of the creek, is there not?

10 A. I'm not sure that that land is being actively farmed  
11 right now.

12 Q. The Vacca Farm has been actively farmed for many years  
13 next to the creek; is that correct?

14 MR. EGLICK: Objection as to the form of the  
15 question; no foundation.

16 MS. COTTINGHAM: Sustained.

17 Q. (Continuing By Mr. Pearce): Are you aware of the Vacca  
18 Farm next to Miller Creek?

19 A. Yes.

20 Q. Are you aware of the history of the Vacca Farm?

21 A. I am aware of some of the history, yes.

22 Q. Are you aware that it's been actively farmed in the past?

23 A. Yes.

24 Q. Are you aware that there were a number of residential  
25 uses immediately adjacent to Miller Creek?

**AR 055231**

1 A. Yes.

2 Q. And were you aware that many of them had lawns all the  
3 way up to the edge of Miller Creek?

4 A. I'm not sure how you would quantify many.

5 Q. But there were certainly some?

6 A. In the port's documents, it does describe that. The  
7 areas I saw of Miller Creek, few of them had lawns right  
8 up to the edge.

9 Q. With respect to functional assessments, you mentioned a  
10 standard method that everybody uses; is that correct?

11 MR. EGLICK: Objection as to the form of the  
12 question; It mischaracterizes the testimony.

13 MS. COTTINGHAM: Why don't you restate your  
14 question.

15 Q. (Continuing By Mr. Pearce): You mentioned a functional  
16 assessment. What functional assessment are you referring  
17 to?

18 A. I was referring to functional assessment as a process  
19 that we go through to analyze functions.

20 Q. My understanding, correct me if I am wrong, I thought you  
21 mentioned a particular type of functional assessment.

22 A. I didn't mention a particular type. There are a number  
23 of models that can be used to do functional assessments.

24 Q. In your testimony you mentioned the Washington State  
25 functional assessment method; is that correct?

**AR 055232**

1 A. Oh, you're talking about my written testimony, yes.

2 Q. That functional assessment doesn't apply to slope  
3 wetlands, does it?

4 A. No.

5 Q. So many of the wetlands in this site, the port site, are  
6 slope wetlands, are they not?

7 A. That's right, you would use a method that applied to  
8 slope wetlands.

9 Q. And you didn't perform a functional assessment yourself?

10 A. I had no access to the property to do such a thing.

11 Q. Could you refer to Exhibit 2025, please. I'll find you a  
12 copy of it.

13 Are you familiar with this document, could you  
14 identify it for us?

15 MR. EGLICK: May I ask for a moment, please.  
16 We need to pull that if we could.

17 MR. STOCK: The problem we're having is  
18 because our notebooks from Ecology aren't labeled by  
19 exhibit number.

20 MR. EGLICK: We've got it, thank you.

21 MR. PEARCE: Binder 4.

22 I think I just asked her if she was familiar with  
23 it.

24 A. Yes, I am.

25 Q. Could you turn to page 11. Is this the section -- well,

**AR 055233**

1           why don't you tell us what it is first.

2       A.   Page 11?

3       Q.   I'm sorry, the document.

4       A.   The document is water quality guidelines for wetlands  
5           using the surface water quality standards for activities  
6           involving wetlands.  It's a Department of Ecology  
7           document dated April 1996.  I'm sorry, wrong document.

8       Q.   Yes, the exhibit.

9       A.   "How Ecology Regulates Wetlands" April 1998.

10      Q.   Okay.

11      A.   Put out by Department of Ecology.

12      Q.   Is this a document you've used in your practice?

13      A.   Yes, it is.

14      Q.   Could you look at page 11.

15      A.   Yes.

16      Q.   Does this give Department of Ecology's opinions about  
17           functional assessments?

18      A.   Yes, it appears to do that.

19      Q.   On page 11, the second paragraph, the one starting "The  
20           various," could you read that.

21      A.   "The various functional assessment methods currently  
22           available all have drawbacks and cannot be heavily relied  
23           upon to base regulatory decisions.  Some of these methods  
24           can provide useful information to assist in making a  
25           regulatory decision, but we are still left with applying

**AR 055234**



1 best professional judgment in determining performance of  
2 wetland functions."

3 Q. Okay. Thank you. Do you agree with that statement?

4 A. I think that it's true that each of these methods that  
5 people use do have drawbacks. One does need to use best  
6 professional judgment in determining, for example, which  
7 model to use under which conditions, how to scope the  
8 functional assessment when you're doing it. But they do  
9 provide a protocol that can be repeated by others who  
10 might want to check the work that someone has done.

11 Q. Was the functional assessment method used by the port  
12 accepted by Ecology and the Corps of Engineers, do you  
13 know?

14 A. As far as I understand it, it was.

15 Q. Have you ever used the WET or the WET functional  
16 assessment method?

17 A. Yes.

18 Q. Does Ecology accept that method?

19 A. It has in the past; however, now they prefer you to use  
20 the Washington assessment method to the extent that one  
21 can.

22 Q. In your testimony I believe you state that filling the  
23 wetlands here will adversely affect fish communities. Do  
24 you recall that part of your testimony?

25 A. Could you refer me to a specific page.

**AR 055235**

1 Q. I don't have a specific page. Do you believe that  
2 filling these wetlands will adversely affect fish  
3 communities?  
4 A. I believe that filling these wetlands will adversely  
5 affect the food web dynamics which could affect fish  
6 communities.  
7 Q. So it could affect fish communities?  
8 A. Yes.  
9 Q. Have you done any quantitative studies of the effect on  
10 fish communities from loss of these particular wetlands?  
11 A. No, I haven't.  
12 Q. Any studies showing that there will be an actual impact  
13 to fish in the lower reaches of Miller, Des Moines or  
14 Walker Creeks?  
15 A. No.  
16 Q. Any quantitative studies showing how much fish production  
17 might be affected?  
18 A. No.  
19 Q. We talked a little bit about mitigation ratios. Is it  
20 your understanding that there are general guidelines,  
21 that the mitigation ratios are general guidelines?  
22 A. Yes.  
23 Q. You also talked a little bit about restoration, and  
24 correct me if I am wrong, but I believe it's your  
25 testimony that to qualify as restoration, there has to be

**AR 055236**

1 no wetland there at all to start with and then you can  
2 restore something?

3 A. Well, there had to have been a wetland there originally  
4 to restore it, but it's not there at the time or you  
5 wouldn't be restoring it.

6 Q. So it has to be currently a filled area and not a wetland  
7 in order to qualify, in your mind, as restoration?

8 A. Generally, removing fill would qualify as a restoration  
9 activity. I'm not saying that's the only activity.

10 Q. Could you take a look again, if you would, at Exhibit  
11 2014. Do you still have that? 2014 was the natural  
12 resources mitigation plan. Did we put that one up there.  
13 I would like you to look at the specific exhibit if we  
14 could just to make sure we're looking at the same thing.  
15 Could you look at the front cover of that. Is that the  
16 November 2001 natural resource mitigation plan?

17 A. Yes.

18 Q. Did you review the entire plan?

19 A. Not all of it, but the majority of it.

20 Q. Are you aware of any additional in-basin mitigation being  
21 added to the plan between the earlier iteration of this  
22 plan and -- well, let me be more specific. Are you aware  
23 of the plan immediately prior to the issuance of the 401,  
24 the NRMP?

25 A. Yes.

**AR 055237**

1 Q. Are you aware of any additional in-basin mitigation being  
2 added between that plan and this version of the plan?  
3 A. Now, are you talking about the December 2000 NRMP?  
4 Q. Between the December 2000 and the November 2001 NRMP.  
5 A. Yes, there has been Des Moines nursery added, the Lora  
6 Lake enhancement and restoration added. I believe A-17  
7 might also have been added in that time period.  
8 Q. Okay. And that's the mitigation of wetland A-17?  
9 A. Yes.  
10 Q. Could I refer you to page 5-50. Does that discuss the  
11 Lora Lake shoreline of wetland restoration design?  
12 A. Yes.  
13 Q. And it includes removing a bulkhead and removing wetland  
14 fill behind the bulkhead?  
15 A. Yes, it does.  
16 Q. I believe you talked about in your testimony a chart that  
17 included Lora Lake. Do you recall that chart, do you  
18 recall what chart that was?  
19 A. I'm not sure which chart you mean.  
20 Q. Was that chart 5-13? I'm sorry, chart 5.1-1 on page 5-3.  
21 A. Yes.  
22 Q. Do you know whether that includes the entire Lora Lake  
23 restoration or just a subpart of the Lora Lake  
24 restoration?  
25 A. Whether this table includes the entire Lora Lake

**AR 055238**

1 restoration?

2 Q. Yes.

3 A. I believe this includes all the activities that I've seen  
4 in the materials to date; I believe this table does  
5 include them all.

6 Q. I think we talked about performance standards at your  
7 deposition; do you recall that?

8 A. Yes.

9 Q. Is it an acceptable way to write a performance standard  
10 to determine the hydro period you want to produce, then  
11 write the performance standard to produce that hydro  
12 period?

13 A. Yes.

14 MR. PEARCE: I don't have any other questions.

15 MS. MARCHIORO: I have a few questions.

16

17 EXAMINATION

18 BY MS. MARCHIORO:

19 Q. Mr. Eglick asked you about a book that was attached to  
20 your testimony. Do you recall that book?

21 A. The book "Wetlands and Urbanization."

22 Q. Yes.

23 A. Yes.

24 Q. And was that a book that was studying the Puget Sound  
25 region?

**AR 055239**

1 A. Yes, it is.

2 Q. And was the study conducted in that book, was that with  
3 respect to monitoring of hydro periods in slope wetlands?

4 A. No, not specific to slope wetlands.

5 Q. And, in fact, were conclusions in that book drawn -- the  
6 conclusions that were drawn in that book had to do with  
7 depressional wetlands?

8 A. The majority of wetlands in our study were depressional  
9 flow-through wetlands.

10 Q. Are you aware of any detailed studies of slope wetland  
11 hydro periods in the Pacific Northwest?

12 A. Not in the Pacific Northwest.

13 Q. Are hydro period alterations more critical for the  
14 functions of a depressional wetland rather than a slope  
15 wetland?

16 A. I'm not sure we know enough to answer whether they're  
17 more critical or not. What we observed in those studies  
18 was that hydro period had a great deal to do with what  
19 happens in terms of biodiversity in a wetland.

20 Q. In depressional wetlands; is that right?

21 A. In the depressional flow-through wetlands, yes.

22 Q. What functional assessment method would you use for a  
23 slope wetland?

24 A. I haven't investigated that, but I know in the book that  
25 many of us have referenced, "Compensating for Wetland

**AR 055240**

1 Losses under the Clean Water Act," it lists 50 different  
2 methods for doing functional assessments and it tells you  
3 what types of situations that are appropriate for and  
4 also the number of states they are used in, so I would  
5 probably start with that if I were going to do slope  
6 wetlands.

7 Q. That's all.

8 MS. COTTINGHAM: Any redirect?

9 MR. EGLICK: Yes.

10

11

EXAMINATION

12

BY MR. EGLICK:

13

Q. Miss Azous, did the port's wetland functional assessment  
14 use any of those 50 different functional assessment  
15 methods recognized in the publication by the Army Corps  
16 you just referenced?

17

A. It's a publication by the National Research Council.

18

Q. Oh, I'm sorry.

19

A. But, no.

20

Q. Mr. Pearce asked you a question, and I will apologize to  
21 Brother Pearce in advance if I don't get it exactly  
22 right, but I think he said, is it acceptable to determine  
23 the hydro period you want to replicate or want to produce  
24 and then write a standard to produce it. Do you recall  
25 that question?

**AR 055241**

1 A. Yes, I do.

2 Q. Okay. And I think you said yes; is that right?

3 A. Yes.

4 Q. And is it acceptable to determine what hydro period you  
5 want to produce without adequate data?

6 A. No.

7 Q. Was there adequate data here to establish a hydro period  
8 baseline for the third runway project-affected wetlands?

9 A. What is recommended and recommended in the published  
10 guidelines in the state water quality manual, which was  
11 just released this year, and also these guidelines have  
12 been available and in use in King County for a number of  
13 years, what is recommended, this came out of the research  
14 we did on these 19 wetlands over a ten-year period, is  
15 that you monitor for at least a year, you monitor a  
16 wetland, so you know where the groundwater levels are,  
17 where the standing water is, and then on that basis, you  
18 can make some determination of what you might be able to  
19 do in an area.

20 Q. And do we have that body of data here?

21 A. We don't have a complete year yet, as far as I know. And  
22 we also have monitoring sites that appear not to capture  
23 the full range of hydrology that's occurring in these  
24 wetlands. As an example, in the first years where  
25 monitoring was done, there were observations of flowing

**AR 055242**



1 water in wetlands, and the monitoring that's being done  
2 in this time period does not capture that flowing water  
3 in wetlands, it's looking at just saturation in the soil  
4 column. The port has responded to this criticism of mine  
5 by saying that the monitoring occurred in different  
6 locations within these wetlands and so you can't really  
7 compare. And I understand that that might be the case,  
8 but if you want to insure that the full hydrologic  
9 functions of the wetlands are being protected, then you  
10 need to monitor the flowing channels, standing water, as  
11 well as soil saturation and develop performance standards  
12 accordingly.

13 Q. Are there any factors indigenous to the airport site as  
14 it currently exists that make it difficult to establish a  
15 preconstruction hydro period?

16 A. Well, there are significant land alterations now from  
17 several years ago that alter the way water moves through  
18 the landscape, the way it's captured in the landscape,  
19 and those are likely to affect the monitoring in the  
20 wetlands.

21 Q. And have you seen data that would allow a hydro period to  
22 be established, that data that predates these what you  
23 have called significant land alterations?

24 A. No.

25 Q. I guess I'm going to have to ask, because we are all

**AR 055243**

1 talking about it, what is a depressed wetland?

2 A. Well, we are talking about a wetland where it sits in a  
3 bit of a bowl so you tend to have standing water as  
4 compared with the slope wetland, which would be on a  
5 slope and you wouldn't necessarily have a large pool of  
6 water but smaller pools and perhaps some flowing channels  
7 through it.

8 Q. Is there anything intrinsic about a slope wetland or  
9 about a depressed wetland that makes the concept of the  
10 importance of hydrology, for example, not apply to one or  
11 the other?

12 MR. PEARCE: Objection: Vague.

13 Q. (Continuing By Mr. Eglick): Well, is there anything  
14 intrinsic in the concept of a slope wetland versus a  
15 depressed wetland that changes how one analyzes wetland  
16 function?

17 A. Well, essentially in both cases, you want to look at  
18 hydrology, because that's the driver, so you need to  
19 understand what the hydro period is of that wetland.  
20 Certain wetland plants are probably going to prefer  
21 depressional wetland versus a slope wetland, so there  
22 will be distinctions there and they will largely be based  
23 on the topography and the way water moves through it.

24 Q. Are these factors that persons in your field are used to  
25 assessing?

**AR 055244**

1 A. I believe so, yes.

2 Q. And is there anything intrinsic in the analysis, for  
3 example, of the wetlands in your book that makes it  
4 inapplicable to slope wetlands, the concepts enunciated  
5 in your books, inapplicable to slope wetlands?

6 A. I think the concepts are highly applicable to any type of  
7 wetland.

8 MR. EGLICK: No other questions. Thank you.

9 MS. COTTINGHAM: Any board questions?

10 MR. JENSEN: Yes.

11

12

EXAMINATION

13

BY MR. JENSEN:

14 Q. Ms. Azous, what are slope wetlands?

15 A. They're wetlands that you find on slopes. There's, in  
16 the port area on the west side, a large ravine that comes  
17 down to Miller Creek and in that ravine, you will find  
18 wetland 37 and wetland 18. It's right in through this  
19 area. This, by the way, is a 1997 aerial photo, most of  
20 this forestland is now gone, but this is a wetland system  
21 that comes through here and it is a sloped area and so  
22 you find these tributaries that are coming down the  
23 slope, and adjacent to them are wetlands that are formed  
24 from water coming down.

25 Q. What are the functions of such wetlands?

**AR 055245**

1 A. Similar to other wetlands, they provide -- the interface  
2 between soil and water provides a different type of  
3 habitat than what you would find in an upland area and  
4 versus lakes as well. That interface there allows a  
5 large number of biochemical processes to occur that don't  
6 occur in other areas. It provides important habitat for  
7 insects, for example, that use the moisture, the moist  
8 soils and the pools of standing water. The water that's  
9 available is important for animals that use it  
10 seasonally. They also provide, to a certain extent, some  
11 water quality improvement. Definitely is important for  
12 base flow support to Miller Creek; in other words, they  
13 have these organic soils that are capturing water through  
14 the winter and become a bank, if you will, that allow  
15 that water to recharge Miller Creek through the dry  
16 season.

17 Q. You mentioned that there were no studies of slope  
18 wetlands in the Pacific Northwest?

19 A. Well, not that I am familiar with, specifically slope  
20 wetlands, no.

21 Q. Are you aware of any studies anywhere of slope wetlands?

22 A. Yes, I have looked at some studies from other parts of  
23 the country.

24 Q. And were they helpful to you here in your analysis?

25 A. Yes, somewhat, yes.

**AR 055246**

1 Q. Is there anything that you know of that would separate  
2 the wetlands here insofar as they are categorized as  
3 slope wetlands as opposed to those in some other part of  
4 the country as far as their value is concerned in your  
5 analysis?

6 A. No.

7 Q. Okay. That's all I have.

8 MS. COTTINGHAM: Do you have any questions?

9 MR. LYNCH: I have one question.

10

11

EXAMINATION

12

BY MR. LYNCH

13

14 Q. Looking at your written testimony, page 6, you were  
15 talking about the functional assessment of the wetland  
16 number 8.

16

A. Yes.

17

18 Q. I was wondering if you had a chance to -- there were a  
19 number of in-basin sites that had been identified for  
20 possible mitigation. I believe one of them was including  
21 the headwater wetland in the Walker Creek basin. Did you  
22 have a chance to do any kind of assessment on these  
23 proposed mitigation sites?

23

24 A. No, I haven't. We had very limited access to the port  
25 properties, essentially two days in a van with about  
eight other experts, so wasn't really able to do any kind

**AR 055247**

1 of functional assessment on the wetlands.

2 Q. So you wouldn't be able to say if mitigation was done on  
3 these sites, you could achieve like a class 2 or category  
4 2 wetland or anything like that?

5 A. I couldn't say for sure the category of wetlands that you  
6 could create. However, I have looked at two documents  
7 that were in the Parametrix files that were made  
8 available to us to look at, and one of them is a copy of  
9 the Des Moines Creek basin plan, and on it are shown  
10 several, many actually, potential mitigation sites that  
11 are in that basin. And then another document was a map  
12 that showed those sites sorted for those that are ten  
13 acres or larger. So what it looked to me as though the  
14 port had decided that perhaps based on economies of  
15 scale, they only want to deal with larger mitigation  
16 sites and so they eliminated using or looking at these  
17 potentially smaller sites that are in basin.

18 But I would like to say that these in-basin sites  
19 may be small, but they provide extremely important  
20 functions within that watershed. Being small does not  
21 mean it's bad. In fact, in our studies of the Puget low-  
22 land wetlands, we often found higher diversity in smaller  
23 wetlands. It's really a combination of factors that can  
24 create the circumstances.

25 Q. My last question to you would be, based upon that

**AR 055248**

1 information that you read, would you be able to tell --  
2 looking again at page 6 of your testimony, you said that  
3 the highest ranking wetland functions being eliminated  
4 from the watershed in the greatest proportion were  
5 nutrient sediment trapping, groundwater discharge,  
6 recharge, habitat for small animals and pasturing bird  
7 habitat. Would these potential sites be the type of  
8 wetlands that would provide these functions?

9 A. To the best of my knowledge, I believe they likely could  
10 provide a good many of these functions, if not all. Not  
11 having seen them, though, I have to qualify it with that.

12 MR. LYNCH: No further questions.

13 MS. COTTINGHAM: Are there any questions as a  
14 result of board questions?

15 MR. EGLICK: Yes, if I might. If I might  
16 approach Miss Azous. Thank you.

17

18 EXAMINATION

19 BY MR. EGLICK:

20 Q. Is this the map?

21 A. Yes, that's the map.

22 Q. Okay.

23 A. There's a color map as well.

24 MR. EGLICK: Exhibit 2131, I think, if folks  
25 would like to look at that then for a moment for those of

**AR 055249**

1           you who have it.

2                       MS. COTTINGHAM:    You say it's in here in a  
3           color version.

4                       MR. EGLICK:     Ms. Azous says.

5                       MR. POULIN:     2131.

6    Q.   (Continuing By Mr. Eglick) And, Ms. Azous, is this the  
7           map you were referring to a moment ago in response to  
8           Board Member Lynch's questions?

9    A.   Yes.

10   Q.   And that, as I understand it, is from the, just to make  
11           sure we are talking about the same map as I have handed  
12           out an individual copy, it's from the 1997 Des Moines  
13           Creek basin plan; is that correct?

14   A.   This map is from the Des Moines Creek basin plan; I am  
15           not certain that this version is in that basin plan  
16           document because this version has potential wetland  
17           mitigation sites identified on it.

18                       MR. PEARCE:     Would you identify the figure  
19           please, Peter.

20   A.   Figure 1, water features.

21   Q.   If you look at 2131, is this the base map?

22   A.   Yes, this is the base map.

23   Q.   And then where did you get the version that I've handed  
24           out that has the label on it of "Potential Wetland  
25           Mitigation Sites," where did you find that?

**AR 055250**



1 A. I found this in the files from Parametrix, the working  
2 files on the project.

3 Q. Okay.

4 MR. PEARCE: Is that an exhibit anywhere,  
5 Peter?

6 MS. MARCHIORO: I'm still not finding the map  
7 you're referring to.

8 MR. EGLICK: It's figure 1-2 is the base map  
9 -- for some reason the binders we were given from Ecology  
10 are not -- I can't tell you what binder -- binder 9.

11 MR. PEARCE: We have that.

12 MS. COTTINGHAM: It's a different one than you  
13 passed out in black and white.

14 MR. EGLICK: Well, the base map is in 2131,  
15 figure 1-2, and then what Ms. Azous has is Parametrix's,  
16 the port's consultant, overlay on the base map.

17 THE WITNESS: They have their identifying  
18 number in the lower right corner.

19 MS. MARCHIORO: Is this an exhibit?

20 MR. PEARCE: Is that an identified exhibit?

21 MR. EGLICK: I didn't expect it to end up as  
22 being an issue quite in response to questioning from the  
23 board. I don't know whether it is an exhibit number, but  
24 since she referred to it in her testimony, I guess we'll  
25 offer it and we can check and see if it's listed

**AR 055251**

1           separately.

2                   MS. COTTINGHAM:   Or we can take a slight break  
3           and you could figure out where it is in here.

4                   MR. EGLICK:     That would be merciful.

5                   MS. COTTINGHAM:   We'll take a 15-minute break,  
6           go off the record, and we will be back to continue with  
7           this.

8                           (Whereupon, a recess was taken.)

9                   MS. COTTINGHAM:   We'll go back on the record.  
10          Mr. Eglick, it's your witness. You're still under oath.

11                   MR. EGLICK:     Yes, I think I was supposed to be  
12          responding to at least a question, if not an objection,  
13          about the exhibit.

14                   MS. COTTINGHAM:   You were trying to offer an  
15          exhibit and it did not jibe with what anyone else had in  
16          their notebooks.

17                   MR. EGLICK:     Right, and here's what I have  
18          been able to discern. This exhibit has the same original  
19          label, "Des Moines Creek Basin Water Features" as the  
20          figure in the Des Moines Creek basin plan, but talking to  
21          Ms. Azous, when she was responding to Board Member  
22          Lynch's questions, she was referring actually to this  
23          sheet. I thought they were the same. And what she has  
24          explained to me is, no, this is a map that she found in  
25          -- I think we had about ten or 15 boxes of materials from

**AR 055252**

1 Parametrix that we eventually got to go through, and Miss  
2 Azous completed going through them over, I guess, at the  
3 Foster Pepper office after her prefiled was submitted,  
4 and in one of the boxes she found this map. So I do not  
5 believe that it is listed as an exhibit. A version of  
6 the base map is, but the annotations with "Potential  
7 Wetland Mitigation Site" are not. She did rely on it in  
8 response to Board Member Lynch's question, and I actually  
9 had thought this was an exhibit, but it is not, as far as  
10 I know, in the exhibit notebooks.

11 I believe the evidence rules allow an expert -- I  
12 know the evidence rules allow an expert to refer to  
13 documents and other things in terms of or in the course  
14 of giving expert testimony, and so just as anything else  
15 an expert would look at and refer to, she can rely on it  
16 in her response to a board member question or anybody's  
17 question.

18 We would also ask that the board accept it as an  
19 exhibit because it will illustrate and basically is what  
20 she referred to in her response.

21 MS. COTTINGHAM: I'll give the other side --  
22 do you have any objection to this being introduced?

23 MR. PEARCE: Yes, we do. We don't have the  
24 slightest idea whether Miss Azous did this. Parametrix  
25 didn't do it. We don't know where it came from, what it

**AR 055253**

1 relies on.

2 MR. EGLICK: If you'll look at the bottom  
3 right, there is Para zero --

4 MR. PEARCE: It's from their files, but they  
5 didn't produce this document.

6 MR. EGLICK: Well, okay, maybe we better use  
7 the word produce clearly here. It was in the files  
8 produced by Parametrix to Foster Pepper, which then were  
9 ultimately in boxes and boxes of material made available  
10 for us to go through. Whether or not Parametrix made it,  
11 I guess, Mr. Pearce is saying he doesn't know.

12 MR. PEARCE: I am saying they definitely  
13 didn't.

14 MR. EGLICK: In any event, the number at the  
15 bottom right indicates that's whose files it came from,  
16 Parametrix being the prime consultant for the port on  
17 wetlands. All the material, the NRMP and so forth is  
18 Parametrix.

19 MS. COTTINGHAM: Do you have a recommendation  
20 as to a number to give this?

21 MR. EGLICK: Well, 801, Mr. Stock suggests.

22 MR. PEARCE: We agree that experts can rely on  
23 scientific reports that are not actually admissible  
24 exhibits, but I still think that counsel needs to lay a  
25 foundation for this exhibit because we don't know whether

**AR 055254**

1 -- we don't have the slightest idea how this exhibit came  
2 into being, who did it, what they relied on, what they  
3 relied on to do it, and Miss Azous may.

4 MS. COTTINGHAM: Why don't you lay a  
5 foundation for it.

6 MR. EGLICK: Well, yes, I will ask her as to  
7 where she found it and so on, but I do want to point out  
8 that I think this would qualify as a Parametrix business  
9 record, and I think that --

10 MR. PEARCE: I'm not objecting on the basis of  
11 hearsay.

12 MR. EGLICK: Okay.

13 Q. Ms. Azous, looking at what's been marked as Exhibit 801,  
14 can you tell us where you obtained it?

15 A. I obtained it from one of the 13 boxes I looked at that  
16 were Parametrix records from the project files.

17 Q. And you don't happen to remember which file or box it was  
18 in in particular?

19 A. No, I'm afraid I don't remember that.

20 Q. Okay. And do you have enough familiarity with the site,  
21 understanding we haven't been permitted to have more than  
22 what you described in terms of access, but what's your  
23 understanding of what the various areas are in terms of  
24 numbering on the map? You see the various areas numbered  
25 and then at the bottom right it says "Potential Wetland

**AR 055255**

1 Mitigation Site"?

2 A. Yes. I thought they just referred to the site number  
3 identifying those particular areas.

4 Q. And are some of those sites that are identified ones that  
5 are familiar to you as potential wetland sites, just from  
6 your review of other documents in the case?

7 A. I haven't looked at these sites and, as far as I know,  
8 they haven't been evaluated in any of the documentation  
9 I've seen.

10 Q. Right. But, for example, do you see where it says 13 Bow  
11 Lake?

12 A. Yes.

13 Q. Okay. Is Bow Lake a geographic area you're familiar with  
14 as being associated with the airport site?

15 A. Yes.

16 Q. Is there anything else you can tell us about this exhibit  
17 other than where you found it and how it's labeled?

18 A. Well, the only other thing I can tell about it is that I  
19 found it in conjunction with another document which  
20 showed mitigation sites that were ten acres or greater,  
21 so it was a version, a computerized version of this map  
22 that had those sites in here that were ten acres or  
23 greater identified. So it looked as though there had  
24 been some kind of analytical effort to evaluate that, but  
25 that's all I know about it.

**AR 055256**

1 Q. Do you have that one with you also?

2 A. I do.

3 Q. May I see it?

4 A. Excuse me while I go through my piles.

5 MS. COTTINGHAM: Mr. Poulin, is the clock  
6 running?

7 MR. POULIN: Yes, it is, Your Honor.

8 MS. COTTINGHAM: Thank you.

9 A. It's right here.

10 MR. POULIN: You can tell by the little light.  
11 That's not showing from there?

12 MS. COTTINGHAM: I can't see it.

13 Q. (Continuing By Mr. Eglick): Is this the other map you  
14 found in conjunction with what's been marked as Exhibit  
15 801?

16 A. Yes, that's it.

17 Q. You've already found it?

18 A. Yes.

19 MR. EGLICK: Could we have this marked as  
20 Exhibit 802.

21 Q. Now, is this what I think is being marked as Exhibit 802  
22 the other map you were referring to?

23 A. Yes, it is.

24 Q. And you said this is a map that shows larger acreage?

25 A. Larger mitigation sites. It's a little hard to read the

**AR 055257**

1 legend, but if you look at the dark brown ground area,  
2 the label reads, "potential mitigation site (greater than  
3 ten acres.)"

4 Q. Okay. Are 801 and 802, are these maps the kinds of  
5 materials that you typically refer to and rely on in your  
6 work as a wetland scientist?

7 A. Well, these look like maps that scientists put together  
8 in order to evaluate potential mitigation sites in the  
9 basin.

10 Q. Just to clarify for the record, if you look at 802, does  
11 the logo at the bottom indicate that, with the numbering  
12 on it, did this also come from the same Parametrix box of  
13 Parametrix documents that 801 came from?

14 A. Yes, it did.

15 MR. EGLICK: We'd offer 801 and 802.

16 MR. PEARCE: Object to lack of foundation.

17 Miss Azous may rely on things like this but not if she  
18 doesn't know who wrote them or where they came from or  
19 how they were produced. I simply don't think there's  
20 adequate foundation for this witness for these exhibits.

21 MS. COTTINGHAM: I think the board will allow  
22 them in and give them the weight it deems appropriate. I  
23 would like, Mr. Eglick, for you or your staff to make  
24 sure that an original copy goes into the originals, which  
25 are somewhere down below me over there, at some point

**AR 055258**



1 over the next 12 hours or so.

2 MR. EGLICK: We will do it. Thank you. And I  
3 don't have any questions. I don't know whether I had the  
4 right to anyway, but I don't.

5 MS. COTTINGHAM: Are you done with your  
6 redirect?

7 MR. EGLICK: Yes.

8 MS. COTTINGHAM: That was as a result of board  
9 questions. Do you have any additional questions as a  
10 result of board questions?

11 MS. MARCHIORO: No.

12 MR. PEARCE: Just one.

13

14

EXAMINATION

15 BY MR. PEARCE:

16 Q. You spoke about a potential mitigation site in the  
17 headwaters of Walker Creek, I think?

18 A. Yes.

19 Q. Is that right?

20 A. Yes.

21 Q. Do you know whether the port owns that property or  
22 whether it's on port property?

23 A. I don't know what the ownership is. It was a site that  
24 was identified by Mr. Stockdale in his testimony as a  
25 potential mitigation site.

**AR 055259**

1 Q. Okay. Nothing further.

2 MS. COTTINGHAM: You are excused. Thank you.

3 MR. EGLICK: Dyanne Sheldon, please.

4

5 DYANNE SHELDON, having been first duly sworn on oath or  
6 affirmed to tell the truth, the whole truth and nothing  
7 but the truth, testified as follows:

8

9

EXAMINATION

10 BY MR. EGLICK:

11 Q. Miss Sheldon, can you give your full name and spell it  
12 for the record, please.

13 A. Dyanne, D-Y-A-N-N-E, Sheldon, S-H-E-L-D-O-N.

14 Q. And what's your occupation, Miss Sheldon?

15 A. I'm a principal of Sheldon & Associates, an environmental  
16 consulting firm.

17 Q. And do you have a particular area of the environment that  
18 you specialize in?

19 A. I specialize in aquatic resources, wetland, streams,  
20 assessments, functional assessments, impact assessments  
21 and restoration design.

22 Q. And is your vita attached as number A to your prefiled  
23 testimony?

24 A. It is.

25 Q. And just give us an overview, if you would, of your work

**AR 055260**

1 experience. Have you ever worked in government in  
2 wetlands capacity?

3 A. I have. I was the first wetland planner for King County.  
4 I started there as a part-time employee in 1981,  
5 conducting the wetland inventory for King County. I  
6 worked as King County's wetland planner from 1983 to  
7 1988. The times blur after awhile. And I have worked  
8 for another small consulting firm for a couple of years  
9 and then I have run my own consulting firm for 11 years.

10 Q. And when you first started working at King County, did it  
11 have a wetlands regulation department?

12 A. It didn't have a wetland regulation period, no.

13 Q. Did you have any involvement in helping it to get one?

14 A. After working with King County staff in the summer of  
15 1981 to help them do their wetland inventory, I proposed  
16 to them that perhaps they would want to write management  
17 guidelines for the roughly 1000 to 1500 wetlands we just  
18 looked at. They suggested I write a proposal to do so.  
19 I did in the summer of 1983. I wrote the first wetland  
20 management guidelines for King County, which were based  
21 at that time on the available science that was present in  
22 the '60s and '70s. And I then was hired by King County  
23 as their first wetland planner, as I said, in '83, and  
24 from that, we developed the more formal King County  
25 wetland program.

**AR 055261**

1 Q. And in the course of your career, have you worked with  
2 government agencies other than King County?

3 A. I have not worked for another government agency as an  
4 employee. I have been hired as a consultant by other  
5 government agencies, yes.

6 Q. And is that something that's happened once in ten years  
7 or more frequently?

8 A. It happens on a regular basis. I have worked in my past  
9 for the Environmental Protection Agency, for the Corps of  
10 Engineers, for various Indian nations in this state and  
11 frequently for the Washington State Department of Ecology  
12 and many, many local cities and counties.

13 Q. And are you currently doing any work for the Washington  
14 Department of Ecology that concerns wetlands?

15 A. I am in charge of the program for Ecology, they have  
16 hired us to do the research for what's called the best  
17 available science research, which is looking at the last  
18 ten years of scientific literature on wetlands functions  
19 and management in order to help the state, I'll say,  
20 modify their management recommendations based on the best  
21 available science per the requirements of the Growth  
22 Management Act.

23 Q. So that's a current assignment you have?

24 A. It is.

25 Q. Your prefiled testimony I think is pretty clear, but I

**AR 055262**

1 wanted to ask just a few overview questions. One, I  
2 think you might have been here earlier when we were  
3 talking about hydrology. Can you comment on what the  
4 relationship is between hydrology and wetland function?

5 A. Well, there are many scientific research papers and  
6 publications that have unequivocally stated that  
7 hydrology is the driver of wetland functions, and I have  
8 cited some of those documents in my prefiled testimony  
9 and the port has used some of the same. Miss Azous just  
10 mentioned the Mitsch and Gosselink book on wetland  
11 science. I reference also a book by Walker, I believe.  
12 And basically that is I think if there is one given in  
13 wetland science is that hydrology is the driver of  
14 functions.

15 Q. And what is the relationship between hydro period and  
16 hydrology, if any?

17 A. As Miss Azous was explaining, the hydro period is in  
18 general the pattern of wetland, excuse me, of water's  
19 presence in a wetland over the course of a water year,  
20 and the water year runs from October to October, not  
21 January 1-January 1. And the hydro period is the  
22 presence of water, if there is standing water and/or the  
23 presence of water in the soils as shallow groundwater and  
24 the pattern of that water in the wetland over the course  
25 of the water year.

**AR 055263**

1 Q. Have you reviewed the Exhibit 1, which is the September  
2 21 401 certification that's under appeal here today?

3 A. I have.

4 Q. And did you find in it any performance standards that  
5 would relate to hydro periods of wetlands down slope?

6 A. I do. In that September issued 401, there is a  
7 performance standard under D(1)(k), and I don't know if  
8 -- do I have a copy of that exhibit here? Can somebody  
9 help me.

10 Q. I'm sorry, we can get you one. Exhibit 1.

11 A. And I will continue to speak as they search. That  
12 performance standard establishes that the wetlands, all  
13 of the wetlands on the site are to have the same  
14 standard, performance standard, for hydrology after the  
15 project is built.

16 Q. And you're talking about Exhibit 1, that's the September  
17 401 certification at page 8, item k; is that correct?

18 A. Page 8, item k, I believe, is correct. Item k, correct.  
19 And this particular item is a - I don't want to misspeak  
20 here - this particular performance standard refers to the  
21 wetlands with predominantly mineral soils. There is  
22 another performance standard, I don't have the citation  
23 in front of me, that has nearly the exact same parameters  
24 for wetlands with organic soils, and the performance  
25 standard is that there has to be water within ten inches

**AR 055264**

1 of the surface for a certain set period of time. Now,  
2 the relationship of that to function is actually quite  
3 critical, because many of the wetlands that are on the  
4 site of the proposed third runway have water depths that  
5 are very different than only ten inches below the  
6 surface. The ten-inches-below-the-surface standard is an  
7 absolute minimum per the federal method for determining  
8 whether or not an area is wetland or not.

9 You have to look at three parameters to determine if  
10 an area is wetland. You have to look at the hydrology,  
11 you have to look at the vegetation, and you have to look  
12 at the soils. And water at ten inches below the ground  
13 surface is the absolute minimum presence of water that  
14 that federal methodology - it's called the 1987  
15 delineation manual - that depth is the absolute minimum.  
16 If you have water that is less than ten or 12 inches  
17 below the surface for 21 consecutive days in the growing  
18 season in the Northwest, you lose what's called your  
19 hydrology parameter.

20 Many of the wetlands that are on this site right now  
21 have -- some of them have standing water, some of them  
22 have water that's two to three inches deep that flows all  
23 through the winter across the top of the site. This  
24 performance standard would allow a change in the hydro  
25 period of any of the wetlands on this site, any of the

**AR 055265**

1 wetlands with mineral soil and, like I said, the same  
2 depth parameter applies for the wetlands with the organic  
3 soil of ten inches below the surface. So it would  
4 potentially allow a change in the hydro period for those  
5 wetlands, and Ecology, in reviewing the performance  
6 standard in the future, would not be able to find fault  
7 or error or mistake if that hydrology had changed.

8 Q. Do you do work involving, I think you said, Corps of  
9 Engineers regulation of wetlands?

10 A. I do. In my consulting work, you know, any project that  
11 we have that has to do anything with filling or altering  
12 wetland, we have to be aware of the Corps of Engineers'  
13 regulatory program. I also for the last eight years have  
14 taught a course at the University of Washington in  
15 environmental law and policy which has forced me to sort  
16 of keep up on federal regulations for wetlands.

17 Q. And does the Army Corps of Engineers have any differences  
18 in how it regulates wetlands in comparison to Department  
19 of Ecology?

20 A. Well, in particular, for this project, the biggest  
21 distinction is those vexing little wetlands on Vacca Farm  
22 that you were hearing were referred to as PCC, or prior  
23 converted croplands. The federal Corps of Engineers  
24 through section 404 of the Clean Water Act, because of  
25 arrangements with the USDA and the Natural Resources

**AR 055266**



1 Conservation Service --

2 Q. What's the USDA?

3 A. United States Department of Agriculture.

4 Q. Okay. Go ahead.

5 A. And the NRCS, the Natural Resources Conservation Service,  
6 has been charged with regulating basically agricultural  
7 wetlands, and that transformation has meant that the  
8 Corps of Engineers no longer has the legal authority to  
9 regulate prior converted croplands. However, Department  
10 of Ecology, through the section 401 of the Clean Water  
11 Act, where the state Department of Ecology is delegated  
12 the federal responsibility of water quality for these  
13 wetlands through section 401, which is why we're sitting  
14 here today, the state, as Mr. Stockdale has testified in  
15 his deposition for this trial, I believe, does have the  
16 legal authority to regulate prior converted croplands as  
17 wetlands in the state of Washington.

18 Q. Now, what does that have to do with the Vacca Farm?

19 A. Well, what it has to do with Vacca Farm is that Vacca  
20 Farm is approximately, of all of the wetland area that is  
21 in the myriad and complex area of Vacca Farm -- and I  
22 might refer the board, if you have my prefiled testimony,  
23 which I'm not sure what the exhibit number is.

24 Q. They have it, it's just your prefiled testimony.

25 A. My prefiled testimony, no number given. If you will look

**AR 055267**

1 at my attachment J, as in jacket, and while you're  
2 looking, I will tell you that this attachment J is taken  
3 from the November 2001 natural resources mitigation and  
4 it is that document's appendix O, so that is the source  
5 of this document. And this shows us some of the actions  
6 that are being proposed at Lora Lake or the Vacca Farm,  
7 excuse me, complex. What is important to note on this  
8 document is that on the index to the far right-hand side,  
9 the legend, you'll see existing wetlands under 401  
10 jurisdiction and it has a very light stippling pattern  
11 that is present across portions of this site. This map  
12 is not the best figure, but it is one that I knew you  
13 would have handy. It illustrates portions of the Vacca  
14 Farm site that are regulated by the Corps through section  
15 401.

16 What this map doesn't illustrate is there's a large  
17 portion of the area here under the word floodplain  
18 grading area where there is no stippling whatsoever.  
19 That area of Vacca Farm is approximately 7.8 acres of  
20 prior converted cropland which Parametrix has testified  
21 is wetland, but the Corps of Engineers doesn't have the  
22 legal authority to regulate but which the state does.

23 What that means in the context of this project, and  
24 how these documents have been submitted, is that it is  
25 that 7.8 acres insofar as an accounting of wetland is

**AR 055268**

1 almost rendered invisible because the documents are  
2 written from the perspective of the 404 and not the  
3 perspective of the 401.

4 So if I can illuminate a bit, and let me take a  
5 moment here to find my records, please. For example, on  
6 Vacca Farms, in the natural resources mitigation plan,  
7 table 3.1-1.

8 Q. And that's Exhibit 2014.

9 A. And that would be page 3-3.

10 So we don't get to turn that clock off when we're  
11 all searching for documents?

12 MS. COTTINGHAM: What page?

13 THE WITNESS: 3-3.

14 Q. That's why we all search quickly.

15 A. Yeah, we try. That is a table that summarizes the  
16 wetland impacts from the project. And what you'll notice  
17 on that table is it's actually the -- the table starts on  
18 page 3-2 and page 3-3 is a continuation. You will note  
19 sort of toward the top of that table there is a Vacca  
20 Farm site label on the left-hand column, four items down.  
21 And under Vacca Farms site are labeled three different  
22 wetland areas, A-1, FW-5 and FW-6. Those wetlands, A-1  
23 is what the port would call a real wetland, and FW-5 and  
24 FW-6 are farm wetlands, which is again a notation out of  
25 the NRCS. It means that they are hydric soils with

**AR 055269**

1 standing water, but they have been farmed frequently  
2 enough that the natural vegetation is gone, but there is  
3 long-term surface inundation present. So that's a  
4 slightly different characterization than the prior  
5 converted cropland, which is the 7.88 acres.

6 What I want you to notice is that under Vacca Farms  
7 site, the prior converted cropland acreage does not show  
8 up, it is not accounted for. Although this is a 401  
9 certification granted by Ecology and it should be  
10 tracking impacts to wetlands per Ecology's regulations,  
11 these descriptions of wetlands and tallying and  
12 accounting of wetlands are based on the 404 standards,  
13 not the 401 standards.

14 Q. As long as we were looking at Exhibit J, there's been  
15 some discussion of Lora Lake earlier today and in your  
16 testimony. Could you address how Lora Lake is treated in  
17 the 401 supporting documents?

18 A. I can. Lora Lake, if we go back to my attachment J from  
19 my pretrial -- again, there are other illustrations of  
20 this phenomena throughout the document, but I will tell  
21 you that, and, in fact, if you haven't shut the door on  
22 it, wetland A-1 is the real wetland that surrounds and  
23 extends to the south around Lora Lake. Wetland A-1 by  
24 the port is identified as having forested class, shrub  
25 class and emergent class wetland vegetation types.

**AR 055270**

1 Q. And now you are referring again to the table 3.1-1 on  
2 page 3-3 of Exhibit 2014?

3 A. That's exactly what I meant to say.

4 Q. Right.

5 A. But what's interesting in that all of the port's  
6 documentation, the body of Lora Lake, the part you would,  
7 you know, put a boat on and go paddle around or canoe on  
8 or swim on, it's not included in wetland A-1, it's not  
9 included in the figures as part of the acreage, it's not  
10 included in the maps or the figures in the functional  
11 assessment document, which I don't know if that's been  
12 submitted as an exhibit or not. And in that document,  
13 it's the 2001 wetland functional assessment, it would be  
14 map 1 and image 1 shows you wetland A-1. And it very  
15 carefully shows you that wetland A-1 is the donut that  
16 goes around Lora Lake, but the water body of Lora Lake is  
17 not included in that wetland assessment. It's not  
18 included when it comes to the functional assessment, it's  
19 not included when it comes to calculating the acreage of  
20 that wetland.

21 And the significance of that comes in when we start  
22 talking about calculating credit for mitigation, because  
23 one of the things that Miss Azous was pointing out, and I  
24 will give you a reference here in a moment, is that  
25 Ecology has granted the port 3.3 acres of mitigation

**AR 055271**

1 credit for Lora Lake simply because the port is going to  
2 go in and make alterations around the margins of the  
3 lake.

4 If you give me a moment, I will find the citation  
5 for the table that has those mitigation tallies on it.  
6 I'm sorry, the clock is ticking and my apologies. I'm  
7 not putting my finger on it immediately. Suffice it to  
8 say, that within this Exhibit 1, in the natural resources  
9 mitigation plan throughout, one will find that Lora Lake  
10 is basically ignored until it does benefit to the port to  
11 gain 3.3 acres of credit for doing absolutely nothing to  
12 the body of the lake itself. They also gain credit, in  
13 other words, for improving the buffer of Lora Lake, for  
14 removing human impacts that are on the margin of Lora  
15 Lake, so there's a bulkhead they remove, they remove old  
16 structures and houses that are present there and remove  
17 lawn, and they calculate that acreage as restoration  
18 credit or enhancement credit, I'm sorry I don't have the  
19 table in front of me, but they also, by those very  
20 actions, turn around and then claim an additional 3.3  
21 acres of credit for the body of water itself.

22 Q. Miss Sheldon, can you explain what a riparian area is?

23 A. Riparian area -- Mr. Stockdale in his, I don't know that  
24 it's labeled a pretrial document for this, but in his  
25 most recent document that I have seen for this, goes to

**AR 055272**

1 some correct length to describe the fact that, as  
2 ecologists, we struggle with this effort to put discrete  
3 labels on ecosystems that go through transitions and  
4 transformations. One of those labels that you will hear  
5 frequently is the term buffer or the term upland or the  
6 term riparian or riparian area or the term wetland.

7 Now, we have clear guidance for where a wetland  
8 starts and stops. And that is granted by the Corps of  
9 Engineers or dictated, perhaps, by the Corps of Engineers  
10 through the 1987 manual.

11 Areas that are adjacent to aquatic features, it can  
12 be rivers, it can be streams, lakes, ocean shore, and  
13 even wetlands, those upland areas adjacent to those  
14 aquatic features are oftentimes called riparian areas.  
15 There is no discrete point at which that riparian area  
16 stops as you walk away from the edge of the aquatic area.  
17 As soon as you walk away from the aquatic area, you are  
18 in a riparian area, you're also in an upland. The term  
19 buffer is a term that we use in a regulatory context. It  
20 doesn't really have a discrete ecological definition.

21 So riparian area is one of a multitude of terms that  
22 applies to the areas that are adjacent to aquatic  
23 resources. Mr. Stockdale is also correct, those upland  
24 habitats provide a variety of functions that overlap and  
25 parallel some of the functions that wetlands provide.

**AR 055273**

1 Q. Okay. Could you look, if you would, at Exhibit 2014,  
2 page 5-3, table 5.1-1, and is that the table you were  
3 referring to?

4 A. Is that the table I was struggling to find. 5-3?

5 Q. I've struggled myself.

6 A. Thank you. Indeed, there it is, the little bugger.  
7 Table 5.1-1, page 5-3. What I want you to notice on  
8 there, please, is under wetland enhancement, there is .32  
9 acres of credit or area, excuse me, identified for the  
10 Lora Lake shoreline, is 3.06 acres of wetland area  
11 identified as the mitigation area for Lora Lake itself.  
12 In going through this document, I found nothing that they  
13 were doing to the water of Lora Lake, other than removing  
14 those shoreline characteristics I was mentioning before,  
15 the human intrusions around the shoreline. And, again,  
16 they do not include Lora Lake, for whatever reason, this  
17 I don't understand, but they do not include the water  
18 body of Lora Lake in their tally of wetland acreage on  
19 the site.

20 Q. In your review of Exhibit 1, which is the September 21  
21 401, have you been able to assess the performance  
22 standards for creation of forested areas?

23 A. Well, I have. One of the issues on the whole tallying  
24 and accounting for wetland function loss and the  
25 mitigation credit here comes back to an argument I'm sure

**AR 055274**



1 that we are all going to hear more about, which is the  
2 value of forests and the value of forests to aquatic  
3 systems. And I think many of us have a mental image of  
4 what we mean by a forest or what we would draw if we had  
5 a crayon and a piece of paper, what we would draw as a  
6 forest. Ecologically, a forest generally means an area  
7 dominated with tall trees, and by tall trees, we mean  
8 here in the Northwest, trees that are taller than 50-plus  
9 feet, a closed canopy. A mature forest oftentimes will  
10 have what's called a sub canopy, which is another layer  
11 of determinant height trees, they don't get really big,  
12 they get to a moderate height. They are called the sub  
13 canopy. Below that would be a layer of shrubs, and below  
14 that is oftentimes a herbaceous layer. And that's what  
15 we use to constitute a forest.

16 I was interested to see in a lot of the text in  
17 NRMP, they talk about the value of the forest and how  
18 they are going to prepare forest and create forest and  
19 plant forests adjacent to these riparian areas and, in  
20 fact, my prefiled testimony and others' testimony have  
21 talked about how there is a very large percentage of  
22 mitigation credit given for these upland forests areas  
23 that they are going to provide.

24 The performance standards that I would like to  
25 direct your attention to are simply the conditions

**AR 055275**

1 attached to the 401 that tell Ecology what the port has  
2 to do in the future to create a forest. I want to offer  
3 some clarification. In my prefiled pretrial testimony, I  
4 discuss the conditions that were attached to the actual  
5 September 401 permit. Silly me, it refers to July 2001  
6 conditions. Since that time there has been issued a  
7 completely revised or a thoroughly revised natural  
8 resource mitigation plan dated November 2001. It was  
9 issued post the September 401 certification, but some of  
10 the performance standards have substantially changed.  
11 And so my pretrial testimony looked, in isolation, would  
12 look as if I was in complete error.

13 I want to illuminate, though, that the forested  
14 performance standards in Exhibit 1 in the natural  
15 resources mitigation plan still, even though they have  
16 been modified, still, in my mind, raise deep question of  
17 whether or not we are really going to get forest on this  
18 site over time.

19 One moment, please. If we would turn Exhibit 1,  
20 starting on page 5-23, table 5.1-7.

21 Q. Do you mean the NRMP?

22 A. Yes.

23 Q. That's Exhibit 2014.

24 A. What do I know. I know wetlands, yeah, I don't know  
25 nothing about no exhibits.

**AR 055276**

1 [Laughter]

2 Q. What were you --

3 A. I'm sorry, page 5-23, table 5.1-7. These are the final  
4 performance standards in the November document of the  
5 NRMP. I want to draw your attention to page 5-24 and the  
6 left-hand column, item 3.

7 MR. PEARCE: I'm having trouble. What page  
8 are we on?

9 THE WITNESS: 5-24, table 5.1-7.

10 MR. PEARCE: Thanks. I thought you said 34.  
11 Thanks very much.

12 A. And that design criteria for trees and shrubs, it's for  
13 planting trees and shrubs, and how this has changed since  
14 July is that they now call out a certain number of shrubs  
15 to be planted per acre and a certain number of trees to  
16 be planted per acre. The last line in that first column  
17 of item 3 says, and I'm quoting, "Interspersed scattered  
18 native conifers in this area." Notice it doesn't tell us  
19 how many conifers, it doesn't tell us the density of  
20 conifers, it doesn't tell us relative spacing of  
21 conifers.

22 In the preceding sentence, you'll notice that it  
23 tells us tree densities greater than 280 trees per acre,  
24 and then in parens, trees include willow species. Well,  
25 when we then look at the next column to the right of the

**AR 055277**

1 performance standard, it tells us that they will have  
2 within year 1 to year 3, they'll have X number or percent  
3 of shrub and tree survival at years 3, 8 and 15, and at  
4 least 280 trees per acre including willow species.

5 Notice that there is no more reference there to scattered  
6 native conifers in the performance standard, it just says  
7 including willow trees. Now, there's no percent  
8 relationship between the willows and the other trees that  
9 are cited.

10 It also says, and I don't want to make you flip  
11 pages yet -- you need to understand that in our native  
12 settings, willows generally tend to be less than 20 to 30  
13 feet tall. They're multi-stem, generally they're  
14 shrubby, they are one of the favorite browses of beaver.  
15 And if the port would allow beaver to come up this  
16 system, it's one of the first things they would start  
17 chomping on, which means that they stump sprout and stump  
18 sprout, which is great, fabulous for the beaver, but they  
19 don't start approximating forests.

20 The point I'm trying to illustrate is that although  
21 the text talks to us about forests, this performance  
22 standard does not guarantee it. If you go back to page  
23 4-9 in the same document, page 4-9, table 4.1-2, this is  
24 a summary of the compensatory mitigation for the  
25 watershed, wetland and stream impacts. Same document,

**AR 055278**

1 November 2001. Notice that the impact they have  
2 summarized there at 18.37 acres, that's only one way of  
3 calculating the total area of impact, but that's a  
4 different issue. So I'm on page 4-9. The mitigation  
5 action, the second column over, "Restore about 12.3 acres  
6 of prior converted cropland, farmed wetland or other  
7 wetland on the Vacca Farm site to shrub-dominated  
8 wetlands." Next paragraph down. "Restore about 2.8  
9 acres of the Des Moines Way nursery site to  
10 shrub-dominated wetlands."

11 Now, this is not surprising. This is a third runway  
12 and FAA has really strict rules about what kind of  
13 wildlife habitat you can create within 10,000 feet of  
14 active runways. So the fact that they are creating  
15 shrub-dominated wetlands shouldn't be surprising. What  
16 is surprising is that they're taking such credit that  
17 they're going to create forested wetlands and forested  
18 buffers.

19 Q. Are forested buffers a substitute for wetlands?

20 A. Only in the sense of the trees. Sorry, I will be a  
21 little more illuminative. They are not substitutes for.  
22 As I mentioned earlier, there are some functions that  
23 forested uplands provide that are similar to forested  
24 wetlands, i.e., lands in the Pacific Northwest that can  
25 allow infiltration of precipitation will clean that water

**AR 055279**

1 if it needs cleaning. They will ameliorate flows so that  
2 we get some augmentation to down-slope areas, we will get  
3 a buffering of the rainfall effect from a water quantity  
4 standpoint, we can get water quality improvement. Those  
5 are upland habitats. They provide those functions at a  
6 reduced rate than what wetlands do.

7 What Ecology is proposing or has identified is that  
8 the value of these forested areas adjacent to the stream  
9 of Miller Creek in particular have such high ecological  
10 value, and there's a great deal of literature that they  
11 cite, which is absolutely true that riparian forested  
12 areas adjacent to fish-bearing streams can have important  
13 ecological influence.

14 Two things: I'm not sure that we're going to get  
15 forests over time. I don't know that we have a  
16 performance standard here that allows Ecology to force  
17 the port to create forests out there. We have  
18 conflicting masters because FAA is telling the port and  
19 Ecology you shouldn't have closed-canopy forests within  
20 10,000 feet of the runway.

21 Attached as one of the attachments to my pretrial is  
22 a copy of the FAA's wildlife management guidelines, which  
23 say, if you have forested areas adjacent to active  
24 runways, you should actively manage them to remove  
25 one-third of the canopy so that you do not have a closed-

**AR 055280**

1 canopy system. That doesn't become a forest in the  
2 Northwest sense of the word over time. If you're  
3 managing to avoid bird strikes, and I'm not suggesting  
4 that next to an airport, one would not, but one shouldn't  
5 take credit for that.

6 The other issue around forested areas -- I just lost  
7 my train of thought.

8 Q. I think I had asked you whether forested areas were  
9 substitutes for wetlands, and I think you said only in  
10 the sense they both have trees, but then you had said  
11 there were two responses you wanted to make. You had  
12 already addressed them whether or not we were really  
13 going to have forests here. I think what we are left  
14 with, though, is assuming that the performance standards,  
15 giving them the benefit of the doubt, would result in  
16 creation of forested buffers, in your professional  
17 opinion, are forested buffers a substitute for wetlands?

18 A. They are different ecosystems. They provide a different  
19 range of functions, and should one provide a majority of  
20 your or a significant percentage, let me be correct here,  
21 of one's mitigation credit as forested uplands when  
22 you're eliminating forested uplands, in my professional  
23 opinion, no.

24 The other point that I was going to make was the  
25 port is going to great design lengths to move Miller

1 Creek. They are moving Miller Creek in the form of Vacca  
2 Farms site into, in their own admission, an  
3 extraordinarily flat setting, over a thousand feet of  
4 length, there's less than two feet of drop elevation.  
5 That calculates out at a .22 percent gradient.

6 I did some homework at home, and I'm going to give  
7 you an image that I think you can understand. Your  
8 bathtub at home has a slope that's ten times greater.  
9 Your bathtub at home has a 2 percent slope.

10 MR. PEARCE: I would move to strike that. I  
11 don't think she has laid a foundation for any of our  
12 bathtubs.

13 THE WITNESS: Excuse me, but there is a UBC  
14 code for drain pipe and --

15 MS. COTTINGHAM: I'm going to sustain the  
16 objection. She hasn't explained why the gradient is  
17 important, so --

18 Q. (Continuing By Mr. Eglick): Why don't we start over.  
19 Have you had a chance to review the plan for relocation  
20 of Miller Creek?

21 A. I have.

22 Q. Okay. And including calculation of what the gradient  
23 would be for the creek?

24 A. Actually, the documents themselves provide that figure of  
25 .22 percent, I did not calculate it.

**AR 055282**



1 Q. And why is that something, as a wetland scientist, that  
2 you would be interested in?

3 A. I'm interested in that as an aquatic ecologist because  
4 gradient of stream has a strong influence on the habitat  
5 that the stream can provide both through oxygenating of  
6 the water as it ripples through stones and over logs and  
7 obstructions within the channel. The oxygenation of the  
8 water has an influence on the function for aquatic  
9 species and vertebrates and fish in particular.

10 One of the arguments being made is that one of the  
11 rationales for giving such a high credit to these  
12 riparian forested buffers is the benefit that those  
13 forested buffers will provide to the stream ecosystem.  
14 The reason I bring up the gradient of stream as being so  
15 extraordinarily flat is that this is not a landscape in  
16 which we are going to have a stream that ripples and  
17 pools and the kind of physical structure that provides  
18 moderate to even high functional value for aquatic  
19 creatures in the stream.

20 And I will refer to an additional attachment in my  
21 pretrial information, and that is a memo to Mr. Kelley  
22 from Paul Tappel. And Paul Tappel is an engineer who  
23 also designs stream restoration. And this memo is, I  
24 believe, in response to a request, and given the tone of  
25 the memo, and I attempted to speak to Mr. Tappel and he

**AR 055283**

1 got gravely ill right at the same time that I got access  
2 to this memo so I have not been able to speak with him.  
3 The tone of this memo is very clear, and it's written as  
4 an engineer, I'm going to attest, looking at the content  
5 and the tone of the memo itself. And that is, it  
6 basically says that this stream will not have good stream  
7 function. And if I can quote for you.

8 MR. PEARCE: Is this an exhibit? Can I  
9 interrupt?

10 THE WITNESS: It's attached to my prefiled.

11 MR. EGLICK: It's attachment M and it's  
12 Exhibit 600.

13 A. In this memo --

14 MR. PEARCE: Can you give me just a second. I  
15 can't remember what the objections were.

16 No objection.

17 A. In this memo, it is offering some feedback to Mr. Kelley  
18 about the actual design of the stream, but, in  
19 particular, I want to refer you to page 2, the third  
20 paragraph from the bottom, and I'll quote. It starts  
21 with section 6.3.4. "This approach to channel design  
22 does not reflect reality. There is a lot going on  
23 besides adjustments of channel parameters and I question  
24 the results. They overlook several basic facts of creeks  
25 such as substantial change with," and then he is using

**AR 055284**

1 engineering term about the rate of flow, and that "also  
2 almost all the sediment transport occurs at the peak  
3 floods."

4 Basically the point he is making here is that this  
5 design, if you read through his memo, does not provide  
6 stream function. It's just too flat. So the rationale  
7 for providing credit for forested riparian areas, because  
8 of the benefit those forested areas are going to provide  
9 to some babbling brook, when what you've got is an  
10 extraordinarily flat swale running through the middle of  
11 this site, it begs the ecological question.

12 MR. EGLICK: I don't have any further questions  
13 on direct. Thank you.

14 MS. COTTINGHAM: Mr. Poulin.

15 MR. POULIN: Yes.

16

17

EXAMINATION

18 BY MR. POULIN:

19 Q. Miss Sheldon, you talked about the forested wetlands  
20 issue and your view that the performance standards in the  
21 401 are lacking to assure that forested wetlands will  
22 occur in the project, as I understand. Are there any  
23 implications for water quality from that situation?

24 MR. PEARCE: Objection: Lack of foundation.  
25 This witness, I don't think, has been qualified to

**AR 055285**

1 testify on that topic.

2 MS. COTTINGHAM: Sustained.

3 Q. (Continuing By Mr. Poulin): Miss Sheldon, do I  
4 understand that your expertise in wetlands includes an  
5 understanding of wetland function?

6 A. Yes. I actually was one of two consultants who were  
7 hired by Department of Ecology to help them develop the  
8 Washington State western functional assessment method.

9 Q. And do wetlands have anything to do with water quality?

10 A. Wetlands can have an awful lot to do with water quality.  
11 Wetlands can slow down the movement of water, they can be  
12 a point for sediment and particulate matter to drop out  
13 of the wetlands and be held -- drop out of the water  
14 column, excuse me, and be held within the wetland. The  
15 biological processes of plants can use nutrients that are  
16 both bound to those particles and also dissolved in the  
17 water moving through the wetland.

18 So there is a lot of technical research about the  
19 influence of wetlands on water quality.

20 Q. Would you say that you are familiar with that research?

21 A. Yes, I am very familiar with that research.

22 Q. Can you explain the implications of what different kinds  
23 of wetland might be present on the site for water  
24 quality?

25 MS. MARCHIORO: Objection: Vague.

**AR 055286**

1 MS. COTTINGHAM: Could you restate your  
2 question.

3 Q. (Continuing By Mr. Poulin): I would like to go back to  
4 my original question. You discussed the difference  
5 between the forested wetland that's projected and your  
6 conviction that it's not likely to occur. In your view,  
7 does that have any implications for the resulting water  
8 quality?

9 A. The presence or absence of the forest isn't going to  
10 affect the water quality so much as what they are  
11 proposing to do in the floodplain where they're proposing  
12 or identifying this forest to be. So the floodplain of  
13 Vacca Farms is going to have 9,000 cubic yards of  
14 material removed from it, it is going to be planted in  
15 dense shrub areas, and it is going to be graded to drain  
16 with every precipitation event or flood event. It is  
17 graded and the cross-sections of that floodplain area  
18 show that it is to discharge water so that there is no  
19 standing water in the floodplain after a flood event or a  
20 precipitation event greater than a two-year event. This  
21 is dictated by the FAA because they do not want to have  
22 standing water left in this floodplain.

23 And of particular note, from a water quality  
24 concern, should be that the bottom of the floodplain has  
25 a shallow swale that bifurcates the entire floodplain and

**AR 055287**

1 discharges into Miller Creek at the bottom of the  
2 floodplain. That swale has a very odd configuration. It  
3 ends at the upper end in a Y. And when you look at the  
4 plan sheets for this project, you will note that at each  
5 end of the Y, there is a 12-inch storm drain that  
6 discharges into that swale. I have not seen it discussed  
7 in the text. It shows up in, and I can find you the  
8 citation, it shows up in the drawings and, in fact, if  
9 you look closely at my Exhibit J, we can probably pick it  
10 out on there, it shows up on the submitted, the  
11 construction bid documents, the full-size plan sheets,  
12 and I have these cited in my pretrial testimony.

13 So there is a water quality issue that I raised in  
14 my pretrial testimony about we don't know anything about  
15 what those storm drains drain, I don't know what the  
16 water quality is within those storm drains, and I also  
17 don't know what the impact of the quantity of water  
18 coming out of those drains would be on the floodplain  
19 function itself.

20 MR. POULIN: Thank you. No further questions.

21 MS. COTTINGHAM: Cross.

22  
23 EXAMINATION

24 BY MR. PEARCE:

25 Q. Thank you, Miss Sheldon. I'm Roger Pearce representing

**AR 055288**

1 the Port of Seattle. We met before your deposition and  
2 several times, I believe?

3 A. Yes, we did.

4 Q. Your testimony, if I understand correctly, is that the  
5 hydro period is the driver of wetland functions?

6 A. The hydrology is the driver of wetland functions,  
7 wetlands hydrology is.

8 Q. And did you say the hydro period is the way you measure  
9 that hydrology?

10 A. The hydro period is the pattern of the water's presence  
11 in a wetland over the course of a water year, how the  
12 water gets into the wetland, whether it comes in through  
13 groundwater, precipitation, surface flow, how it gets  
14 there, how deep it is, how long it stays, and how it gets  
15 out.

16 Q. And the hydro period is very dependent on rainfall, is it  
17 not?

18 A. It depends on the type of wetlands that we are dealing  
19 with. Not all hydro periods are strongly tied to  
20 precipitation. It can be tied to a variety of factors as  
21 I just identified.

22 Q. Do you know whether the hydro period in slope wetlands  
23 varies more than in depressional wetlands?

24 A. Do I know that generically across the country or do I  
25 know that here on this site?

**AR 055289**

1 Q. Generically in western Washington.

2 A. Generally in western Washington. Oftentimes slope  
3 wetlands are driven by groundwater discharge.

4 Groundwater discharge depends upon the landscape setting  
5 and the underlying geologic setting as to how that  
6 groundwater will show up in that wetland so that it's  
7 directly linked to precipitation. The fact that the  
8 water gets into the groundwater and shallow groundwater  
9 from precipitation, yes. Is there a direct correlation  
10 between precipitation out of the air and an instant flux  
11 in the wetland? Not necessarily. Wetland dependent.

12 Q. I'm not talking about instant flux, but an annual flux.

13 A. I will stand with my -- I can pull out the Mitsch  
14 textbook and talk a little bit about how one determines  
15 the water budget of a wetland, and the water budget of a  
16 wetland is determined by where the water comes from, so  
17 in a slope wetland, the water can come from  
18 precipitation, it can come from surface flows up above,  
19 it can come from groundwater that is moving through the  
20 soils and discharging into the wetland proper. So  
21 precipitation plays a role in that. And if one wanted to  
22 know what the hydro period was on the wetlands on the  
23 port's property, then one would be monitoring those  
24 wetlands prior to any alterations in their watersheds and  
25 correlating that hydro period to precipitation. Then one

**AR 055290**



1           could maybe more directly answer your question.

2       Q.   Okay.  How much of a change in a hydro period or can you  
3           tell how much of a change in the hydro period would make  
4           a significant change in the wetland functions?

5       A.   It depends on the wetland type, and oftentimes we don't  
6           have enough scientific literature or we don't have the  
7           ability to measure function so precisely that if we say  
8           there's an X percent change in the water budget, that  
9           there will be a Y percent change in particular functions.  
10          The systems are extraordinarily complex, they are  
11          responding to a myriad of variables and environmental  
12          factors.  So simply linking the hydro period exclusively  
13          to functions, it can't be done.  That hydro period and  
14          water is the primary driver is still true, but you can't  
15          isolate it as the only driver.

16       Q.   Okay.  Thank you.  Could you look at binder number 10  
17          from Ecology, Exhibit 2132.

18       A.   I have 2 of 10.

19                   MS. COTTINGHAM:  What color is it?

20                   MR. PEARCE:  It's a green one.

21       A.   Ecology's are green.  Could you refer me to a page.

22       Q.   Well, let's just look at 2132 and let everyone get there.  
23           Could you identify this document for us?  Have you seen  
24           this document?

25       A.   I have not seen this compilation of this document.  It is

**AR 055291**

1           comprised of, unless it has a different color, it's  
2           comprised of many different documents, some of which I  
3           have seen and some of which I have not. Are we looking  
4           at the same document? You handed this to me.

5       Q. My understanding is it's only supposed to be one of them  
6           and that it's supposed to be the public notice for  
7           application of permit dated 27 December 2000.

8       A. And maybe I am displaying some ignorance and not  
9           realizing that all of these documents were attached.

10      Q. I'm sorry, it's just this one behind 2132.

11      A. Yes, I have seen the public notice of application.

12      Q. Sorry for the confusion. Could you look at page 11.

13      A. I'm sorry, you directed me to a point on the page or do  
14           you want me to read the whole page?

15      Q. No, the third paragraph from the bottom of this public  
16           notice, could you read that paragraph for us?

17      A. "The State of Washington is reviewing this work for  
18           compliance with the state water quality standards.  
19           Ecology will extend jurisdiction over 7.88 acres of lands  
20           as waters of the state considered as prior converted  
21           cropland by the Corps, non-jurisdictional under federal  
22           law on the Vacca Farm property. Accordingly, impacts  
23           being considered under water quality standards include an  
24           additional .92 of an acre of the state to be filled at  
25           the Vacca Farm site and an additional 6.92 acres of water

**AR 055292**

1 of the state temporarily impacted during construction and  
2 mitigation."

3 Q. Do you know where Ecology did provide mitigation for  
4 those impacts described in the public notice?

5 A. Ecology provided mitigation at a ratio that was different  
6 for what it applied to other wetlands that it regulated  
7 as existing wetlands for this permit in the Vacca Farm  
8 7.88 acres.

9 Q. In your prefiled testimony I believe you talked about a  
10 riparian buffer that's ten feet in width. Do you  
11 remember that?

12 A. I do. And I was referring to a specific illustration  
13 that's in the NRMP.

14 MR. EGLICK: That's Exhibit 2014.

15 A. I'm not going to remember that. 2014. My apologies.  
16 The exhibit that I was referring to or, excuse me, the  
17 illustration in that exhibit is -- let me find you a page  
18 number, I'm sorry, it's not numbered in the document.  
19 It's past page 5-12, it's several pages past it, and the  
20 figure is labeled 5.1-3. And on that cross-section, if  
21 you'll note - and being a person who has dealt with the  
22 law frequently, I tend to take words seriously - there is  
23 labeled on the left and the right-hand side of that  
24 figure a zone demarcated particularly on the west side  
25 that is noted as ten feet wide called the riparian zone.

**AR 055293**

1           That is what I was referring to in my pretrial testimony.

2   Q.   Okay.  And there's a riparian zone on the right-hand side

3       as well?

4   A.   There is a riparian zone on the right-hand side.  It is

5       scrunched between the road fill for 154th and the edge of

6       the bank of the stream.

7   Q.   And it doesn't have a demarcation as to width, does it?

8   A.   It doesn't, but judging by the dimensions, I would guess

9       it to be less than 20 feet wide.

10  Q.   I would rather you not guess because that may -- do you

11       see those two little slashes in there between the bottom,

12       in the bottom line?

13  A.   I do.

14  Q.   Might that mean that that is a variable line?

15  A.   It does mean and I do recall from the text that that

16       line, this buffer area between 154th and the stream bank

17       is constrained by 154th and, in fact, in the text of the

18       NRMP, they refer to that constraining presence of 154th

19       as one of the reasons why the stream has such a low

20       gradient, because they couldn't make the stream any

21       shorter because they had to move it outside of, to the

22       west of 154th.

23                 MR. PEARCE:  Miss Cottingham, if you could ask

24       her just to answer my questions, we'll go a lot faster.

25       I'm not complaining, just conscious of the clock.

**AR 055294**

1 MR. EGLICK: Well, I think Miss Kenny gave  
2 answers in the fullness thereof and I think Miss Sheldon  
3 is being much more restrained.

4 MS. COTTINGHAM: If he's asking questions that  
5 are yes or no, answer yes or no; if he is asking broader  
6 questions, you may elaborate.

7 Q. (Continuing By Mr. Pearce): Could you look at figure  
8 5.2-2 in that same document.

9 A. In the NRMP?

10 Q. I am sorry, you don't have it in front of you?

11 A. I'm not --

12 Q. Exhibit 2014.

13 A. I do have my copy of it, yes.

14 Q. Let's get you a copy of the actual exhibit we're using.

15 A. And what figure are you referring to, please?

16 Q. It's figure 5.2-2. Here you go.

17 A. I might want to refer -- okay, I'll use this one.

18 Q. And it's figure 5.2-2.

19 A. You've just shown me figure 5.1-4.

20 MS. COTTINGHAM: Which one do you want?

21 Q. It's 5.2-2 and it is on page 5-66.

22 A. Yes.

23 Q. Does this show a typical cross-section of the Miller  
24 Creek stream buffer enhancement?

25 A. This shows a landscape architect's rendering of a

**AR 055295**

1 cross-section of the riparian corridor.

2 Q. And it's wider than ten feet from the stream, is it not?

3 I think there's a scale.

4 A. I'm looking to see if it's actually labeled, the riparian

5 buffer, and I don't see a label that says that, so I

6 don't know that. As I said in my pretrial testimony, I

7 was referring to the figure that actually labeled and

8 identified the riparian zone, and I don't see that label

9 on here.

10 Q. It says 100-foot buffer there, doesn't it?

11 A. It does say buffer.

12 Q. And this shows a relatively forested area, doesn't it?

13 A. It shows a landscape architect's rendering of a forest,

14 indeed. Is this one of the performance standards?

15 Q. I beg your pardon?

16 A. Nothing. Sorry.

17 Q. Could you look at figure 5.1-5 that's on page 5-28.

18 A. Same exhibit?

19 Q. Same exhibit. I'm sorry, it's the page after 5-28, it's

20 a pull-out.

21 MR. EGLICK: Where are we?

22 MR. PEARCE: On page - I believe that's it,

23 Peter - 5.1-5.

24 Q. Does this show the Vacca Farm area planting plan?

25 A. Excuse me, I have a reduced version of that. If yours is

**AR 055296**

1 a pull-out, mine is not.

2 MR. EGLICK: Maybe Miss Sheldon could use --

3 THE WITNESS: May I use my own document?

4 MR. EGLICK: I don't see a reason why not.

5 MR. PEARCE: If it's the --

6 THE WITNESS: It is the November, you may check  
7 the title if you want. I haven't substituted pages.

8 MS. COTTINGHAM: None of us have pull-outs  
9 either so perhaps you are referring to a different one.

10 MR. PEARCE: It's figure 5.1-5. It may have  
11 been reduced.

12 THE WITNESS: I believe it has been because my  
13 older version has a pull-out.

14 MR. PEARCE: I have an older version as well  
15 that's 8 and half or 11 by 17.

16 MR. POULIN: Why is it that some are reduced  
17 and some are not?

18 Q. (Continuing By Mr. Pearce): Does this show the Vacca  
19 Farm planting plan area?

20 A. That's what the label in the figure is, yes.

21 Q. Does it show the riparian buffer planting zone on it?  
22 There is one label down on the far right or it's to the  
23 south.

24 A. Yes, I'm just looking at the figure and determining  
25 what's on here.

**AR 055297**

1 Q. Can you identify that?

2 A. In the legend -- yes, I see what you're pointing out as a  
3 riparian buffer zone. The legend labels that the Miller  
4 Creek relocations and buffer planting zone as opposed to  
5 riparian buffer.

6 Q. Do you see the scale on the left-hand side there on the  
7 corner?

8 A. I do.

9 Q. Is that greater than ten feet?

10 A. Does the scale show something greater than ten feet? I  
11 don't understand.

12 Q. Yes, is this riparian planting zone shown greater than  
13 ten feet?

14 A. Yes.

15 Q. Okay. That's all I have for that exhibit or for that  
16 piece of it.

17 Do you know what the preproject conditions were in  
18 Lora Lake?

19 A. Do I know what the preproject conditions were at Lora  
20 Lake? I'm going to ask you to explain what you mean. I  
21 have driven by that area and I know from the  
22 documentation that there were residences adjacent to Lora  
23 Lake. Have I been there, I have not. I was not in  
24 preproject.

25 Q. I won't ask you any questions about it then.

**AR 055298**



1           With respect to the planting plans, the performance  
2 standards you talked about for the Vacca Farm area --

3 A. Yes.

4 Q. -- have you reviewed any of the actual planting plans for  
5 that area?

6 A. I have looked at the construction plans and the reduced  
7 plan sheets, which I believe are labeled appendixes A  
8 through L, I may have that notation wrong, but they were  
9 a reduced set of plan sheets for the NRMP. I have also  
10 looked at the full scale 24-by-36-inch construction bid  
11 documents, which I don't think have been submitted here  
12 so I doubt that they have an exhibit label, but they are  
13 the more current actual construction documents that I  
14 believe the port has put out to bid or intends to put out  
15 to bid for a portion of that area.

16 Q. Let's just talk about the appendices that you looked at,  
17 because I believe --

18 A. Do we have a copy here? I have a copy in my car, but --

19 Q. No, I don't want to ask you that much detail about them,  
20 I just want to --

21 A. I have not looked at them for quite awhile, so I'm not --  
22 maybe you could ask your question and I could determine  
23 my answer.

24 Q. Let's see if we can do that. Do those give any  
25 additional detail about the actual planting plan and what

**AR 055299**

1 trees are going to be planted?

2 MR. EGLICK: I'm going to object.

3 Q. If you recall.

4 MR. EGLICK: Well, this shouldn't be a memory  
5 test. If he wants to show her an exhibit and ask her,  
6 that's fine; otherwise, the question is just a memory  
7 test. I don't think it's an appropriate question.

8 MS. MARCHIORO: That's not an appropriate  
9 objection.

10 MR. PEARCE: That's not an appropriate  
11 objection.

12 MR. EGLICK: Well, objection as to the form:  
13 No foundation. What are we talking about?

14 MS. COTTINGHAM: Sustained.

15 MR. PEARCE: I believe she described what she  
16 was talking about and if she recalls what the plan shows,  
17 I'd like her to --

18 MS. COTTINGHAM: Why don't you ask her  
19 questions to elicit her memory.

20 Q. (Continuing By Mr. Pearce): Do you recall what those  
21 appendices with the planting plans show?

22 A. The appendices with the planting plans, I don't, I don't  
23 recall the details.

24 Q. Are you aware of whether the FAA has reviewed and  
25 approved the natural resource mitigation plan?

**AR 055300**

1 A. I'm not aware of that. I don't know.

2 Q. With respect to the stream, you're not a fisheries  
3 biologist, I take it?

4 A. I am not.

5 Q. Is it your testimony that streams with a slope designed  
6 the way this relocated stream through the Vacca Farm is  
7 being designed don't provide any aquatic habitat?

8 A. I did not say that.

9 Q. So that's not your testimony?

10 A. It is not my testimony that that channel will not provide  
11 aquatic habitat.

12 MR. PEARCE: Okay. That's all the questions I  
13 have. Thank you.

14 MS. COTTINGHAM: Miss Marchioro.

15 MS. MARCHIORO: I have no questions.

16 MS. COTTINGHAM: Any redirect?

17 MR. EGLICK: Yes.

18

19 EXAMINATION

20 BY MR. EGLICK:

21 Q. Miss Sheldon, you were asked whether you were a fisheries  
22 biologist. Do you recall that?

23 A. I do, I have a vague recollection.

24 Q. And then you were asked something about aquatic habitat.  
25 Do you recall that?

**AR 055301**

1 A. I do.

2 Q. And is aquatic habitat the same as fish habitat?

3 A. Not in the least, which is why I answered the question  
4 the way I did. Aquatic habitat is habitat for aquatic  
5 invertebrates. It can be for fish, it can be for  
6 crayfish, it can be for amphibians, it can be for all  
7 sorts of myriad of creatures, so the fact that this  
8 channel will be there doesn't even preclude that fish  
9 might use it as well.

10 Q. So if you have aquatic habitat for some little  
11 invertebrate, that doesn't mean it's aquatic habitat for  
12 some other fish or something like that, does it?

13 A. The complexities of aquatic habitat are many and the fact  
14 of, you know, this is a stream channel and, you know,  
15 there will be aquatic habitat provided in it, yes.

16 MR. EGLICK: No other questions.

17 MS. COTTINGHAM: Any board questions?

18 MR. JENSEN: No.

19 MR. LYNCH: No.

20 MS. COTTINGHAM: I have two clarifying  
21 questions to ask you.

22

23 EXAMINATION

24 BY MS. COTTINGHAM:

25 Q. You were talking about the performance standards related

**AR 055302**

1 to the hydro period, page 8 of Exhibit 1, and you talked  
2 -- I don't know that you need to look at it, it's a  
3 clarification. You talked about the ten inches of water  
4 below the surface --

5 A. Yes.

6 Q. -- minimum presence of water depth, and less than that,  
7 you lose your hydrology parameter. Can you explain this  
8 in lay terms?

9 A. You bet, absolutely.

10 Q. What's the importance of this?

11 A. What am I talking about?

12 Q. What are you talking about?

13 A. Here is what I am talking about. Earlier today somebody  
14 asked the question to distinguish between a delineation,  
15 what is a delineation. And a delineation is when a  
16 wetlands biologist goes into the field and has to  
17 identify where the precise edge of a wetland is. We are  
18 directed professionally to use a standard guide book to  
19 do that, and one of the parameters we have to use is  
20 whether or not there is evidence of wetland hydrology.  
21 And so that is one of the three driving parameters is  
22 wetland hydrology.

23 One of the ways you look to see if wetland hydrology  
24 is present is you look for obvious things like standing  
25 water or the evidence of standing water. If you don't

**AR 055303**

1 have surface water present, you look below the soils  
2 surface. And you dig a pit, you use a soil probe, you  
3 use various means to look below the soil surface. And  
4 per that guidance, from the delineation manual from the  
5 Corps, we have to find evidence of wetland hydrology  
6 within the top ten to 12 inches of the soil profile. If  
7 we do not find evidence of the presence of shallow water  
8 in that soil profile and tie it to other parameters, then  
9 we don't have a wetland.

10 That's what I mean by the minimum standard, if  
11 you'll allow me. In the Pacific Northwest, because of  
12 our glacial activity, shallow groundwater builds below  
13 the surface towards the top. Because we have, as any  
14 anybody whose done any gardening knows, two to three feet  
15 below the surface we have glacial till. Water does not  
16 move through it easily. So when it rains in the fall,  
17 water seeps into the soil, starts collecting against that  
18 impervious layer and builds up into the soil towards the  
19 surface. And that ten-inch parameter says that I have  
20 water that is stacked up from below the wetland, as it  
21 were, up to within ten inches of the surface and it has  
22 to be there for a certain period of time.

23 Now, it can be more water than that, the water can  
24 be closer to the surface, I can have standing water, but  
25 if I don't have that water within ten to 12 inches of the

**AR 055304**

1 surface for a certain set period of time, I don't have  
2 wetland. That's what I mean by the minimum.

3 Q. Thank you. That explained it.

4 On a different topic having to do with Lora Lake,  
5 you talked about how the body of Lora Lake did not get  
6 calculated into the figure, and I think you were trying  
7 to say it impaired or affected the calculation for credit  
8 by adding to the bulk of the number, but without doing --  
9 can you explain that a little bit more?

10 A. You actually just summarized it quite well. It's adding  
11 to the bulk of the number without doing anything  
12 basically. In other words, Lora Lake in preport project  
13 condition was a 50-plus-year-old suburban setting, had  
14 houses around it, it had lawns going down to the edge of  
15 it. And here is this little dot of a lake and part of it  
16 surrounded by wetland on the Vacca Farm site. The port  
17 is proposing to go around that margin. They have taken  
18 away many of the structures or all of the structures  
19 perhaps that were there and they have taken out or are  
20 going to take out bulkheads and lawn and reshape the  
21 margin of the lake. And they have denoted a certain  
22 acreage credit for that action.

23 Looking in the text of the NRMP, I don't see any  
24 other action that they're doing interior to the lake.  
25 They're not shallowing the lake and making it more

**AR 055305**

1 emergent marsh, because that would bring in more water  
2 fowl and you don't want to; they're not planting plants  
3 in it, they're not doing any other thing, but they are  
4 granted 3.3 acres of credit for the lake. Does that  
5 clarify?

6 Q. Yes.

7 Are there any questions as a result of board  
8 questions?

9 MR. EGLICK: No, thank you.

10 MS. COTTINGHAM: Miss Marchioro, any questions  
11 as a result of board questions?

12 MS. MARCHIORO: No, thank you.

13 MR. PEARCE: None, Your Honor.

14 MS. COTTINGHAM: With that, you are excused.

15 I think we are close enough to five that we probably  
16 shouldn't call up another witness.

17 Did you stop the clock?

18 MR. POULIN: Just did, Your Honor.

19 MS. COTTINGHAM: A couple of things before we  
20 go off the record. How much time has elapsed?

21 MR. POULIN: On the appellant's side, three  
22 hours, five minutes, 19 seconds.

23 MS. COTTINGHAM: Just so you know, I am  
24 rounding off the seconds. I'm only going to go with  
25 hours and minutes. So say that again.

**AR 055306**



1 MR. POULIN: I'll give you clock time and you  
2 can do the -- three hours, five minutes, and 19 seconds.

3 MS. COTTINGHAM: Okay. And for the  
4 respondents.

5 MR. POULIN: One hour, 46 minutes and 8  
6 seconds.

7 MS. COTTINGHAM: And let's go over the list of  
8 witnesses for tomorrow. We have gone through Ann Kenny,  
9 Tom Luster, Amanda Azous and Dyanne Sheldon.

10 MR. STOCK: Tomorrow will be Dr. Leytham and  
11 William Rozeboom. Then we will go to Dr. Lucia, Greg  
12 Wingard, the water rights witnesses, Swenson, Schlender,  
13 Barwin and Rushton.

14 MS. COTTINGHAM: Slow down. Swenson --

15 MR. STOCK: I can write it up there. Swenson,  
16 Schlender, Barwin and Rushton.

17 MR. YOUNG: Let me make a comment on the water  
18 rights folks. We have got arrangements for Schlender and  
19 Barwin to be here tomorrow since they have to come from  
20 the east side. So if we can fit them in and get them  
21 done tomorrow, that would be helpful to them, and I  
22 haven't made arrangements for the other two, Swenson and  
23 Rushton, because I was assuming we weren't going to get  
24 to them, but --

25 MR. STOCK: Well, we may.

**AR 055307**

1 MR. YOUNG: Rushton is here in town.

2 MR. STOCK: So if he could be here, that would  
3 be great, and you said Swenson?

4 MR. YOUNG: Swenson is from Bellevue.

5 MR. STOCK: So he could be here also.

6 MR. YOUNG: He could be here.

7 MS. COTTINGHAM: Why don't we do an assessment  
8 at noon, and the priority would be if the two folks come  
9 from Yakima, we'll get them on first, would that be  
10 acceptable?

11 MR. STOCK: Sure. The other thing I needed to  
12 alert everyone to is that Dr. Kavazanjian is scheduled to  
13 come in Thursday morning. If we go through all of the  
14 witnesses we just talked about, Dr. Kavazanjian won't be  
15 available tomorrow afternoon, so we may need to shift Dr.  
16 Willing up and put him on the stand because he is from  
17 Bellingham and can come down here.

18 MS. COTTINGHAM: And you're saying call him  
19 tomorrow at noon and have him here by 1:30, is that what  
20 you're implying?

21 MS. OSBORN: I've already arranged for him to  
22 be here in the afternoon.

23 MR. STOCK: There is one other minor point  
24 that I want to raise, and I raise it because of the  
25 crucial minutes that it takes to find the exhibits. We

**AR 055308**

1 notice that Department of Ecology provided the board, the  
2 port and its own copies of the exhibits with the exhibit  
3 numbers actually on the binder. The copy they provided  
4 to ACC just says ACC's copy. So I'm not going to make a  
5 big deal of it, I'm not going to request credit for  
6 trying to find the exhibits, but what I would like is for  
7 Ecology to provide us labels for the binders that they  
8 provided to everyone else so we can quickly find Ecology  
9 documents.

10 MS. COTTINGHAM: Can Ecology do that by  
11 tomorrow?

12 MR. YOUNG: Yeah, we can do that.

13 MS. COTTINGHAM: And with that, we're going to  
14 go off the record.

15 (Hearing adjourned at 4:50 p.m.)

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**AR 055309**

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C E R T I F I C A T E

STATE OF WASHINGTON)

) ss

COUNTY OF THURSTON )

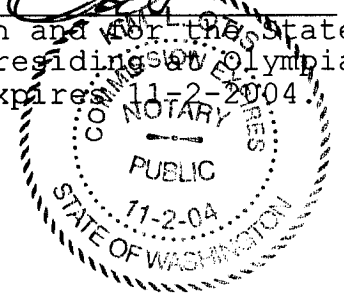
I, Kim L. Otis, a duly authorized Notary Public and Certified Court Reporter in and for the State of Washington, residing at Olympia, do hereby certify:

That the annexed and foregoing Transcript of Proceedings, consisting of pages 2-1 through 2-237 was reported by me and later reduced to typewriting by means of computer-aided transcription; that said transcript as above transcribed is a full, true and correct transcript of my machine shorthand notes of said proceedings heard on the 19th day of March, 2002, before the Pollution Control Hearings Board.

WITNESS MY HAND AND OFFICIAL SEAL this 22nd day of April, 2002.



Notary Public in and for the State of Washington, residing at Olympia. My commission expires 11-2-2004.



Kim L. Otis  
Washington CSR No. OTIS\*KL441C9  
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**AR 055310**